Supreme Court, U.S.
FILED

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NO._____

IN THE
SUPREME COURT OF THE UNITED STATES

SOB, Inc., a Minnesota corporation, d/b/a Sugar Daddy's; Amy Chenoweth; Shannon Wiborg; Kathryn Haskins; Mark Van Gelder; and Mary Clifford Van Gelder,

Petitioners,

vs.

County of Benton,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Is an adult entertainment Plaintiff who presents affirmative evidence as to the unreliability of the secondary effects studies relied upon by an enacting municipality and who demonstrates through uncontradicted evidence 8 years of absence of secondary effects caused by local adult entertainment entitled to the burden-shifting process adopted in the plurality opinion in *City of Los Angeles v. Alameda Books?*

II Can a public indecency ordinance, with an "artistic merit, exception, be enforced by custodial arrest, when the very purpose of such arrest is to restrain presumptively protected speech, and when a history of enforcement of the ordinance establishes that it has been used against protected speech?

PARTIES TO THE PROCEEDING

Petitioner SOB, Inc., is a Minnesota corporation. The remaining Petitioners are individuals residing in the State of Minnesota.

Respondent is the County of Benton, Minnesota, a county organized under the laws of the State of Minnesota.

All parties to the proceedings below are parties to this petition.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, counsel for Petitioners informs this Court that SOB, Inc., has no parent or subsidiary corporations, and no publicly owned company holds any ownership interest in the corporation.

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SECONDARY AUTHORITIES:

Paul, Linz & Shafer, "Government Regulation of "Adult Businesses Through Zoning and Anti-Nudity Ordinances: Debunking the Legal Myth of Negative Secondary Effects, 6 Comm. L.& P. 355 (2001) 7, 13

OPINIONS BELOW

The opinion of the United States Court of Appeals, reported at 317 F. 3d 856 (8th Cir. 2003), is set forth in the Appendix at A.1-A.28. The unreported order of the Court of Appeals denying the petition for rehearing en banc is set forth in the Appendix at A.49.

The District Court opinion is reported at 171 F. Supp. 2d 978 (D. Minn. 2001), and is set forth in the Appendix at A.29-A.48.

JURISDICTION

The Court of Appeals entered its judgment on January 24, 2003. Petitioners timely filed a petition for rehearing en banc, and that petition was denied on February 27, 2003. This Court has jurisdiction pursuant to Title 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in pertinent part:

> "Congress shall make no law...abridging freedom of speech or of the press..."

The Fourteenth Amendment to the United States Constitution prohibits any state from depriving..."any person of life, liberty or property without due process of law."

STATEMENT OF THE CASE

In the summer of 2001, virtually contemporaneously, Petitioner SOB, Inc., opened for business an adult entertainment establishment called "Sugar Daddy's" featuring live nude dancing, and Respondent County of Benton enacted its "public indecency" ordinance.

The ordinance, in Sec 1, asserts as its purpose, "to prohibit public indecency in order to deter criminal activity, to promote societal order and public health and to protect children." Appendix at A.51.

Sec. 2 of the ordinance sets forth purported "findings" as follows:

"A. Public indecency can increase the

incidence of criminal activity, including but not limited to prostitution, disorderly conduct and sexual assault.

B. Public indecency can expose children to an unhealthy and nurtureless environment.

C. Public indecency can disrupt the disorderly operation of public events and public accommodations, thereby fostering societal disorder.

D. Public indecency can present health concerns in places of public accommodation and other public settings." Id.

Section. 4 of the ordinance provides:

"A person, who knowingly or intentionally in a public setting or place:

A. appears in a state of nudity;

B. fondles the genitals of himself or herself; or

C. fondles the genitals of another person;

D. commits public indecency and is guilty of a misdemeanor under the

> Minnesota law and upon conviction thereof, shall be punished by a fine of up to $1,000 or by imprisonment for up to 90 days, or both." Id. at A.53

Under Sec. 3A, the term "nudity" is defined as:

> (1) The appearance of a human bare buttock, anus, male genitals, female genitals, or female breasts; or
>
> (2) A state of dress which fails to opaquely cover a human buttock, anus, male genitals, female genitals, or areola of the female breast." Id. at A.52.

Sec. 5 of the ordinance provides:

> "The provisions of Sec. 4.A. of this ordinance shall not apply to any theatrical production performed in a theater by a professional or amateur theatrical or musical company which has serious artistic merit." Id. at A.53.

The purported "findings" in Sec. 2 of the ordinance are utterly without evidentiary support in the legislative history of the ordinance. With respect to the notion that "public

indecency" can increase the incidents of criminal activity, including but not limited to prostitution, disorderly conduct and sexual assault...," absolutely no evidence was presented to the Board of Commissioners that the existing adult entertainment businesses, which had been present in the county for nearly eight years, resulted in any of the above-described activity. Quite to the contrary, the uncontradicted testimony of Mark Van Gelder before the Board of Commissioners was that in those eight years, there has never been an arrest for prostitution or sexual assault at any adult entertainment establishment. Id. at A.81. With respect to disorderly conduct and other criminal activity, the uncontradicted evidence before the Board of Commissioners was that the two adult entertainment facilities have generated no more police calls or complaints of criminal activity than have other commercial establishments within the county, such as Rumor's Bar, or the Conoco gas station. Id. at A.80-A.81.

The legislative history is also devoid of any evidence that either such establishment has caused any societal disorder or public health concerns.

Quite to the contrary, the undisputed evidence before the Board of Commissioners presented by Mr. Van Gelder was that the adult entertainment establishments, based upon recorded property values from the county assessor, have contributed to no decline in the value of the surrounding property, and, as noted, supra, have generated no greater demand on law enforcement than have comparable commercial establishments within the county. Id. at A.79.

Rather than relying upon any evidence of the County's actual experience with adult entertainment establishments, the County purportedly relied exclusively on studies done in other jurisdictions. However, also submitted by Van Gelder to the County Board of Commissioners at the public hearing prior to enactment were copies of Paul, Linz & Shafer, "Government

Regulation of 'Adult' Businesses Through Zoning and Anti-Nudity Ordinances: Debunking the Legal Myth of Negative Secondary Effects, 6 Comm. L. & P. 355 (2001). [1] Appendix at A.78-A.79.

The article examined virtually all of the purported "secondary effects" studies generally relied upon by municipal governments in enacting zoning and anti-nudity regulations, measured them against minimal standards of reliability and concluded the following:

> "With few exceptions, the methods most frequently used in these studies are seriously and often fatally flawed. Specifically, these studies do not adhere to professional standards of scientific inquiry and nearly all universally fail to meet the basic assumptions necessary to calculate an error rate - the test of reliability of findings in science. More importantly, those studies that are scientifically credible demonstrate either no negative secondary effects associated with adult businesses or a reversal of the presumed negative effect." Id. at 367.

1Because the Paul, Linz & Shafer article is published, in the interest of brevity, it is not included in the Appendix.

In addition to this article, Petitioners also submitted to the District Court an updated version of that paper, submitted to this Court as an appendix to the amicus curiae brief of the First Amendment Lawyers Association in *City of Los Angeles v. Alameda Books*, 535 U.S. 425 (2002). In addition to reviewing the studies relied upon by the County, the paper also examined studies conducted, under methodologically sound criteria in Fulton County Georgia;[2] Charlotte/Mecklenburg County, North Carolina; and Fort Wayne, Indiana, all of which concluded that there was absolutely no evidence that the presence of adult entertainment facilities have any relationship to any adverse secondary effects. Appendix at A.90-A.147.

In upholding the validity of the ordinance in question, the District Court, by the Honorable Donald Alsop, specifically made the following factual findings:

2These studies were referenced by the court in *Flanigan's Enterprises v. Fulton County, Ga.*, 242 F. 3d 976 (11th Cir. 2001), cert. denied, 536 U.S. 904 (2002).

"9. The presence of businesses offering live, nude entertainment in Benton County has not adversely affected property values or increased crime in the areas near those businesses.

10. Benton County's motivation in adopting the Ordinance was to disrupt or eliminate businesses in Benton County that offer live, nude entertainment." Appendix at A.33.

In its conclusions of law, the District Court also found:

"As Plaintiffs argue, the record amply demonstrates that Benton County passed the Ordinance in order to eliminate nude dancing at Sugar Daddy's and similar establishments (footnote omitted). The Benton County Attorney proposed the Ordinance as a constitutionally acceptable means of regulating sexually-oriented business, not as a general prohibition of public indecency. The record contains no complaints to the Benton County Commissioners about campus streakers, topless vendors, nude sun bathers, or any form of public nudity other than nude dancing. The comments at the public hearing, both for and against the Ordinance, focus almost entirely upon the issue of nude dancing. In light of those facts, it is disingenuous to suggest that an abstract concern with non-existent adverse secondary effects of sexually-oriented businesses, rather than concrete complaints about the moral value of nude dancing, motivated Benton County to pass the ordinance." Id. at A. 36-A.37.

While reluctantly upholding the validity of the public indecency ordinance, Judge Alsop enjoined the County from enforcing it by means of custodial arrest. Appendix at A.4.

On appeal, the Eighth Circuit affirmed the District Court in upholding the validity of the public nuisance under the facts presented, but reversed and vacated the injunction against enforcement by custodial arrest. Appendix at A.4.

Petitioners now seek review of that decision.

REASONS FOR GRANTING THE WRIT

I. THE REFUSAL OF THE COURT OF APPEALS TO EMPLOY THE BURDEN-SHIFTING STANDARD ADOPTED BY THE PLURALITY OPINION IN *CITY OF LOS ANGELES V. ALAMEDA BOOKS,* CREATES A CONFLICT WITH THE RELEVANT DECISIONS OF THIS COURT.

In *City of Los Angeles v. Alameda Books, Inc*, 535 U.S. 425, 122 S. Ct.1728 (2002), supra, the plurality opinion of Justice O'Connor adopted a burden-shifting procedure to determine whether or not the evidence offered by a municipality

in support of a secondary effects rationale for regulating adult entertainment businesses passed constitutional muster. Justice O'Connor wrote:

> "In *Renton*, we...held that a municipality may rely on any evidence that is 'reasonably believed to be relevant' for demonstrating a connection between speech and a substantial, independent government interest. [Citations omitted.] This is not to say that a municipality can get away with shoddy data or reasoning. A municipality's evidence must fairly support the municipality's rationale for its ordinance. If Plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual finding, the municipality meets the standards set forth in *Renton*. If Plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies the ordinance. [Citation omitted.]" [3]

3To be sure, this standard represents only the stated view of 4 Justices, to-wit: Justices O'Connor, Chief Justice Rehnquest, Justice Scalia and Justice Thomas. However, it is clear that the 4 dissenting justices, Souter, Stevens, Ginsburg, and Breyer, would require a far more stringent evidentiary showing on the part of a municipality. See, for example, 122 S. Ct. at 1747 Souter, J. dissenting. Consequently, it is clear

122 S. Ct. at 1736.

Consequently, under the procedure suggested by the *Alameda Books* plurality, evaluating the sufficiency of a municipality's evidentiary showing in support of an adult entertainment regulation involves a burden-shifting process. Initially, a municipality may rely upon any evidence reasonably believed to support its conclusions. If that evidence and those conclusions are not challenged by an adult entertainment Plaintiff, the municipality's burden is fully met. If, however, an adult entertainment Plaintiff succeeds in challenging the evidentiary basis for the municipality's conclusion, either by challenging the validity of the data relied upon by the municipality, or by independently producing data which disputes

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that the above quotation from the plurality opinion represents the bare minimum which a majority of a United States Supreme Court would require to justify an adult entertainment regulation premised on a secondary effects theory. It is clearly the standard which now governs the instant case.

the municipality's conclusion, then the burden shifts to the municipality to produce independent evidence supporting the municipality's conclusion.

Plainly, Petitioners in the instant case produced more than sufficient evidence to invoke Justice O'Connor's burden-shifting process.

They cast serious doubts as to the validity of any of the studies relied upon by the municipality for its conclusion that adult entertainment causes adverse secondary effects. See for example, Paul, Linz & Shafer, supra, both their original article and subsequent follow-up paper. This included reference to three studies conducted under methodologically sound criteria, all of which concluded that there was no evidence that the presence of adult entertainment facilities had any relationship to adverse secondary effects. Appellants' Appendix at A.90-A.147.

Most significantly, Petitioners tendered essentially

uncontradicted evidence showing that in the 8 years of existence, the two adult entertainment facilities had in fact caused no adverse secondary effects, including evidence of a total absence of arrest for drugs or prostitution, and including evidence of producing fewer police calls than the local convenience store.

Plainly, if this showing is insufficient to invoke the burden-shifting process referred to by Justice O'Connor in *Alameda Books,* what type of showing would suffice? [4]

In asserting that Petitioners had not made a sufficient showing, the panel wrote:

> "Though neither *Pap's* nor *Alameda Books*, squarely resolves the issue, we conclude that Sugar Daddy's theory is unsound. Its local evidence addressed only two adverse secondary

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4In this regard, the Eighth Circuit's decision is also directly contrary to *Flanigan's Enterprises v. Fulton County, Ga.*, supra 242 F. 3d 976 (11th Cir. 2001), holding that where local evidence, over a period of years, plainly indicated a complete absence of adverse secondary effects, it was impermissible for the county to rely on virtually the same dubious foreign studies relied upon by the county in the instant case.

> effects, property values and crime in the vicinity of an adult entertainment establishment. These are issues particularly relevant to zoning. A ban on live nude dancing, on the other hand, may address other adverse secondary effects, such as the likelihood that an establishment whose dancers customarily and routinely violate long-established standards of public decency will foster illegal activity, such as drug use, prostitution, tax evasion and fraud." 317 F. 3d at 863. Appendix at A.14-A.15.

As far as drug use and prostitution were concerned, Petitioners' evidence plainly did directly address the issue, pointing out that in the 8 years that adult entertainment establishments had been in existence, there had never been a drug or prostitution arrest in either of those establishments, while there had been three drug arrests at the local Conoco gas station. Appendix at A.79. In his dissenting opinion in *City of Erie v. Pap's A.M.*, 529 U.S. 277, 120 S. Ct. 1382 (2000), Justice Stevens suggested that the belief that requiring dancers to wear pasties and G-strings would reduce the incidence of prostitution, drug dealing and sexual assault, would require

nothing short of a "titanic surrender to the implausible." 120 S. Ct. at 1409, Stevens, J. dissenting. In this case, it would require a titanic surrender to the impossible, since it is difficult to imagine how the incidence of prostitution, drug dealing and sexual assault could be reduced to less than zero.

This leaves the only purported "secondary effects" unaddressed to be "tax evasion and fraud." However, it should be noted, there is not a scintilla of evidence that the County Board in fact relied on any "tax evasion and fraud" theory in enacting the ordinance. Quite to the contrary, the purported "findings" set forth in Sec. 2 of the ordinance,[5] mentioned only criminal activity, prostitution, disorderly conduct, sexual assault, exposing children to an unhealthy and nurtureless environment, disrupting the ordinary operation of public events and accommodations, and presenting health concerns, none of which are supported in the record.

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5 Appendix at A.51.

Secondly and more importantly, *Alameda Books* plainly requires a minimal connection between the solution adopted and the "secondary effect" sought to be alleviated. If the suggestion that placing pasties and G-strings on dancers would reduce the incidence of prostitution, drug offenses and sexual assaults requires a 'titanic surrender to the implausible," what type of surrender is required for the conclusion that placing pasties and G-strings on dancers will make more honest taxpayers out of either the dancers or the club owners? Perhaps the Eighth Circuit believes that pasties and G-strings will cure breast cancer as well.

Indeed, if the showing made by Petitioners in the instant case is insufficient to invoke Justice O'Connor's burden-shifting process, it is virtually inconceivable that any adult entertainment Plaintiff could ever make such a showing. This is plainly not what was intended by this Court in *Alameda Books*.

II. THE REVERSAL OF THE INJUNCTION AGAINST CUSTODIAL ARREST IS DIRECTLY

CONTRARY TO THIS COURT'S DECISIONS ON RESTRAINT.

In *Lee Art Theater, Inc. v. Virginia,* 392 U.S. 636 (1968), the United States Supreme Court held that a search warrant to seize a motion picture film alleged to be obscene could not be based solely upon the conclusory assertions of a police officer that the material was obscene, without independent judicial review. Five years later in *Roaden v. Kentucky,* 413 U.S. 496 (1973), this Court held that warrantless seizures of allegedly obscene films were per se unconstitutional, and not subject to exceptions such as search incident to a lawful arrest. The rationale behind these decisions is clear: seizure of a motion picture film restrains its continued showing. The decision to restrain speech presumptively entitled to the protection of the First Amendment cannot be made by the judgment of a police officer alone, without judicial supervision. Custodial arrests of a nude dancer for violation of the indecency ordinance functions exactly in the same way that a warrantless

seizure of a motion picture film does. It effectively restrains the dancers's continued right of expression. Moreover, under the Minnesota Rules of Criminal Procedure, such a restraint is the very purpose of the arrest. See Minn. R.Crim. P. 6.01, Subd. 1(1)(a), mandating officers to proceed by citation rather than custodial arrest "unless it reasonably appears to the officer that arrest or detention is necessary to prevent bodily harm to the accused or another or further criminal conduct or there is a substantial likelihood that the accused will fail to respond to a citation." There are few conceivable situations where arrest of a nude dancer for performing without pasties and G-strings will cause bodily harm to the accused or another. Moreover, if the dancer has identification, there is no substantial likelihood that she would fail to respond to a citation. Consequently, the only conceivable basis for a custodial arrest would be to "prevent...further criminal conduct," meaning further nude dancing. Thus, the deliberate purpose of the custodial arrest is

to restrain speech. Under *Lee Art Theater* and *Roaden,* that decision cannot be made in the judgment of officers alone, without judicial supervision.

In rejecting this analysis, the panel wrote:

> "The District Court relied on *Admiral Theater [v. City of Chicago,* 832 F. Supp. 1195 (N.D. Ill. 1993)], noting that arresting officers must access whether a performance has 'serious artistic merit' to determine whether the Ordinance's theatrical exception applies. We disagree. While 'serious artistic merit' is a component of obscenity jurisprudence, [Citation omitted.] the ordinance is not obscenity-based. The ordinance's exception applies only to a 'theatrical production performed in a theater by a professional or amateur theatrical or musical company.' Thus, an arresting officer will know to a virtual certainty whether a particular live nude performance at Sugar Daddy's falls within the exception (emphasis supplied)." Appendix at A.26-A.27.

The record before the Eighth Circuit hardly supported the Court's confidence; indeed, it supported exactly the opposite conclusion. As the affidavit of counsel accompanying the rehearing petition plainly indicated, the four prosecutions

commenced under this ordinance resulted in two jury acquittals, with the county attorney dismissing a third, being publicly quoted as saying that the jurors found serious artistic value in the two performances which resulted in acquittals.[6] Appendix at A.147-A.168.

This history clearly indicates that the only "virtual certainty" about this ordinance is that officers will make erroneous decisions under it. If that erroneous decision is a custodial arrest to prevent further performances, it is unlawful restraint on speech and should be restrained.

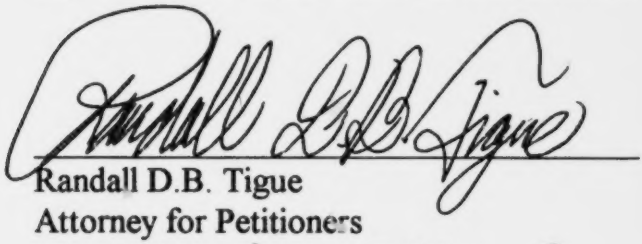
CONCLUSION

6To be sure, neither the affidavit nor the court records attached thereto are part of the record on appeal. However, the Eighth Circuit has repeatedly stated that it may take judicial notice for the first time on appeal of the proceedings in other courts. See for example, *Rhodes v. Meyer*, 334 F. 2d 709 (8th Cir. 1964); *Gustafson v. Cornelius Co.*, 724 F. 2d 75 (8th Cir. 1983); *Hood v. United States*, 152 F. 2d 431 (8th Cir. 1946); *Jenkens by Agyei v. State of Missouri*, 931 F. 2d 470 (8th Cir. 1991).

For all of the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

RANDALL TIGUE LAW OFFICE, P.A.



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Dated: May 28, 2003

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 01-3928
No. 01-4022

SOB, Inc., et al.,

Plaintiffs Appellants
Cross Appellees,

Appeals from the United States
District Court for the District of Minnesota

v.

County of Benton,

Defendant Appellee
Cross Appellant.

Submitted: October 10, 2002
Filed: January 24, 2003

Before LOKEN, BEAM, and MELLOY, Circuit Judges.

LOKEN, Circuit Judge.

The primary issue in this case is whether Benton County, Minnesota, violated the First Amendment by enacting an ordinance prohibiting live nude dancing entertainment when there was evidence presented to the County Commissioners suggesting that existing adult entertainment establishments had not adversely affected nearby property values or crime rates. The issue is surprisingly complex because it lies at the intersection of two related but distinct lines of Supreme Court First Amendment decisions.

After SOB, Inc. opened Sugar Daddy's, an alcohol-free cabaret featuring live nude dancing, the Benton County Board of Commissioners enacted Ordinance 332 ("the Ordinance") generally prohibiting "public indecency":

> Public Indecency Prohibited. A person, who knowingly or
>
> intentionally in a public setting or place:
>
> A. appears in a state of nudity;

B. fondles the genitals of himself or herself, or

C. fondles the genitals of another person;

commits public indecency and is guilty of a misdemeanor under Minnesota law and upon conviction thereof, shall be punished by a fine of up to $1,000 or by imprisonment for up to 90 days, or both.

The Ordinance compelled Sugar Daddy's female dancers to cover their breasts and genitals with pasties and G-strings while performing. SOB, Inc. and three dancers (collectively, "Sugar Daddy s") commenced this action to declare the Ordinance overbroad and contrary to their protected First Amendment interests in live nude dancing and to enjoin its enforcement. Sugar Daddy's manager, Mark Van Gelder, and his wife joined as plaintiffs and asserted a claim that another aspect of the Ordinance violates their due process, equal protection, and privacy rights.

After consolidating plaintiffs' motion for a preliminary injunction with the trial on the merits, the district court held that the Ordinance is constitutional, but the court enjoined the County from enforcing it "by means of custodial arrest." S.O.B, Inc. v. County of Benton, 171 F. Supp. 2d 978 (D. Minn. 2001). Both

sides appeal this final order. We affirm the district court's decision except we vacate the injunction against custodial arrest.

I. The Public Nudity Prohibition.

Non-obscene erotic and sexually explicit speech are entitled to some First Amendment protection. But businesses that market sexually explicit speech and expressive conduct may be regulated to the extent their activities are perceived as having adverse social and economic effects on society. For example, a law prohibiting the sale of sexually oriented materials to minors was upheld against a First Amendment challenge in Ginsberg v. New York, 390 U.S. 629, 634, 640-42 (1968). More recently, the Supreme Court has considered First Amendment challenges to two different kinds of regulatory action taken by local governments to attack the perceived negative effects of non-obscene adult entertainment: the use of traditional urban zoning strategies to restrict the time, place, and manner in which adult entertainment may be marketed, and the use of traditional public indecency statutes to prohibit certain types of sexually expressive conduct. These recent

decisions govern our resolution of this appeal.

Zoning issues reached the Supreme Court first. It is now well-established that sexually oriented businesses may be subjected to reasonable time, place, and manner restrictions based upon the nature of the products or services they sell, even though those products and services include an expressive content protected by the First Amendment. See City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48-50 (1986); Young v. American Mini Theatres, Inc., 427 U.S. *50,* 62-63 (1976). Under Renton, state and local governments may use diverse zoning strategies (for example, either dispersal or concentration) to regulate adverse secondary effects of such businesses such as crime, prostitution, and economic blight. The regulation must be "content neutral" to avoid strict First Amendment scrutiny. But content-neutral in this context means simply that the regulation is *justified* by the legitimate government purpose of reducing or eliminating adverse secondary effects. 475 U.S. at 47-50. If a zoning regulation is content-neutral in this sense, it will withstand First Amendment scrutiny "so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses" and the regulation allows for reasonable alternative avenues for

communication. Id. at *51-52.*

This case involves the second type of regulation, use of a public indecency ordinance to totally prohibit live nude dancing. Public indecency, including nudity, was a crime at common law, and public indecency statutes are clearly within the police power of state and local governments. A First Amendment challenge to this type of regulation first reached the Supreme Court in Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991). The Court upheld the application of Indiana s long-standing public indecency statute to prohibit live nude dancing as entertainment, but no five Justices agreed on a single rationale for that conclusion. Noting that nude dancing is expressive conduct, not pure speech, four Justices applied the four-part test in United States v. O Brien, 391 U.S. 367, 377 (1968), for judging government action restricting conduct that includes both speech and non-speech elements:

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment

freedoms is no greater than is essential to the furtherance of that interest.

Applying this test, the Chief Justice, Justice O'Connor, and Justice Kennedy considered Indiana s prohibition of live nude dancing sufficiently justified by the traditional police power to protect morals and public order. Barnes, 501 U.S. at 569. Justice Souter, on the other hand, applied the O'Brien test but looked to Renton for relevant precedent and concluded that the prohibition was justified by "the State's substantial interest in combating the secondary effects of adult entertainment establishments." Id. U.S. at 582. (Justice Scalia, the fifth member of the Barnes majority, concluded that live nude dancing is conduct unprotected by the First Amendment. The four dissenters concluded that the prohibition was the suppression of protected erotic dancing and could not survive First Amendment strict scrutiny.)

The Court again took up this issue in City of Erie v. Pap's A.M., 529 U.S. 277 (2000). A larger majority again upheld application of an ordinance generally prohibiting public nudity to ban live nude dancing. A four-Justice plurality (Justice O Connor, joined by the Chief Justice, Justice Kennedy, and Justice Breyer), now

agreeing with Justice Souter that the adverse secondary effects analysis of Renton was the proper analytical framework, concluded that the government had a sufficient interest in regulating this sexually explicit conduct because:

> There is nothing objectionable about a city passing a general ordinance to ban public nudity (even though such a ban may place incidental burdens on some protected speech) and at the same time recognizing that one specific occurrence of public nudity - nude erotic dancing - is particularly problematic because it produces harmful secondary effects. 529 U.S. at 295

The plurality then concluded that the City of Erie ordinance passed muster under the four-part O'Brien test because:

> [t]he ordinance regulates conduct, and any incidental impact on the expressive element of nude dancing is de minimis. The requirement that dancers wear pasties and G-strings is a minimal restriction in furtherance of the asserted government interests, and the restriction leaves ample capacity to convey the dancer's erotic message.

Id. at 301. Justice Souter dissented in part, agreeing with the plurality's analytical approach but voting to remand because the City of Erie had not made an evidentiary record supporting its claim of adverse secondary effects. (Justice Scalia, joined by Justice Thomas, concurred, adhering to his approach in Barnes: "The traditional power of government to foster good morals[,] and the acceptability of the traditional judgment (if Erie wishes to endorse it) that nude public dancing *itself* is immoral, have not been repealed by the First Amendment." 529 U.S. at 310. Justice Stevens and Justice Ginsburg dissented, adhering to the position of the dissenters in Barnes and criticizing the majority for extending Renton's adverse secondary effects analysis to the absolute prohibition of live nude dancing.)

The final relevant Supreme Court precedent is another zoning case, the Court's very recent decision in City of Los Angeles v. Alameda Books, Inc., 122 S. Ct. 1728 (2002). Alameda Books probed the evidentiary parameters of the Renton test, considering whether Los Angeles had presented sufficient evidence of adverse secondary effects to avoid summary judgment invalidating an amendment to its zoning ordinance that prohibited more than one adult entertainment business

from operating in the same building. Once again, Alameda Books produced no majority opinion. A four-Justice plurality (Justice O Connor, joined by the Chief Justice, Justice Scalia, and Justice Thomas), in concluding that the City had made a sufficient showing to survive summary judgment, granted substantial but not total deference to the City s legislative judgment about how to combat adverse secondary effects:

> This is not to say that a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance. If plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality s factual findings, the municipality meets the standard set forth in Renton. If plaintiffs succeed in casting doubt on a municipality s rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance. 122 S. Ct. at 1736.

Justice Kennedy concurred but cautioned that, to justify a zoning ordinance under Renton, "a city must advance some basis to show that its regulation has the

purpose and effect of suppressing secondary effects, *while leaving the quantity and accessibility of speech substantially intact."* Id. at 1742 (emphasis added). Justice Souter for the four dissenters concluded that the City's earlier studies regarding adverse secondary effects totally failed to support this amendment *and therefore* the amendment was impermissible content-based regulation.

Applying these Supreme Court precedents to this case, we can quickly isolate the critical inquiry. A ban on live nude dancing is content-neutral if its purpose is to combat harmful secondary effects, even though the ban"has some minimal effect on the erotic message by muting that portion of the expression that occurs when the last stitch [of clothing] is dropped." Pap's, 529 U.S. at 294 see ILQ Invs., Inc. v. City of Rochester, 25 F.3d 1413, 1416 (8th Cir. 1994). Here, the Ordinance states that its purpose is to "prohibit public indecency in order to deter criminal activity, to promote societal order and public health and to protect children," and it includes express findings that public indecency can increase criminal activity, including prostitution, disorderly conduct and sexual assault; expose children to an unhealthy and nurtureless environment; foster social

disorder by disrupting the orderly operation of public events and public accommodations; and present health concerns in places of public accommodation and other public settings. Sugar Daddy's argues these findings are unsupported and suggests the Ordinance's stated purpose is pretextual. But Sugar Daddy's virtually concedes, and we conclude, that the Ordinance is content-neutral within the meaning of Pap's and therefore subject to intermediate First Amendment scrutiny under the four-part O'Brien test.

Likewise, Sugar Daddy s does not argue that the Ordinance fails the fourth part of the O'Brien test, that "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of [the substantial governmental] interest." In *Pap's*, 529 U.S. at 289, the plurality declared that live nude dancing is a form of expressive conduct that "falls only within the outer ambit of the First Amendment's protection." The plurality then concluded that an absolute prohibition on such conduct meets the O'Brien test because "[t]he requirement that dancers wear pasties and G-strings is a minimal restriction in furtherance of the asserted government interests, and the restriction leaves ample capacity to convey the dancer's erotic message." 121 S.

Ct. at 301 (plurality opinion)."[1]

Thus, the fighting issue in this case, as it was in Alameda Books, is whether the County had sufficient evidence of adverse secondary effects to justify enacting the Ordinance. Before enactment, the County Commissioners gathered studies by other municipalities and other evidence of the adverse secondary effects associated with adult entertainment businesses. At the public hearing, concerned citizens spoke in favor of the Ordinance. Mark Van Gelder presented evidence suggesting that Sugar Daddy's and the King's Inn, a Benton County adult entertainment establishment that had been in business for nearly eight years, had neither

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1"'When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds."' Marks v. United States, 430 U.S. 188, 193 (1977). Applying this test, Justice O'Connor's opinion for the four-Justice plurality in Pap's stated the holding of the Court. See Nightclub Mgmt. Ltd. v. City of Cannon Falls, 95 F. Supp. 2d 1027, 1040-41 (D. Minn. 2000). On the other hand, Justice Kennedy s more narrow concurrence in Alameda Books stated the holding of the Court in that case.

caused higher crime rates nor depressed the value of nearby properties in the time they had been operating.[2] Sugar Daddy's also submitted an article criticizing the methodologies of the secondary effects studies relied upon by other municipalities, Bryant Paul, et al., Government Regulation of "Adult" Businesses Through Zoning and Anti-Nudity Ordinances: Debunking the Legal Myth of Negative Secondary Effects, 6 Comm. L. & Pol. 355 (2001). Sugar Daddy's argues that, on this record, the County had an insufficient basis for concluding that the Ordinance is needed to further the substantial government interest in combating harmful secondary effects.

Though neither Pap's nor Alameda Books squarely resolves the issue, we conclude that Sugar Daddy's theory is unsound. Its local evidence addressed

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[2]Van Gelder presented statistics showing fewer police calls to Sugar Daddy s in the prior year than to a local gas station, and a report suggesting that the value of properties near Sugar Daddy s and the King s Inn increased more from 1994 to 2001 than the value of properties near two businesses that do not feature nude dancing. The record before the Commissioners included contrary evidence and argument submitted by proponents of the Ordinance.

only two adverse secondary effects, property values and crime in the vicinity of an adult entertainment establishment. These are issues particularly relevant to zoning. A ban on live nude dancing, on the other hand, may address other adverse secondary effects, such as the likelihood that an establishment whose dancers and customers routinely violate long-established standards of public decency will foster illegal activity such as drug use, prostitution, tax evasion, and fraud.[3] Moreover, zoning restrictions typically impact a broad range of adult entertainment businesses, whereas a ban on live nude dancing imposes a *de minimis* restriction on expressive conduct, while otherwise "leaving the quantity and accessibility of speech substantially intact." Alameda Books, 122 S. Ct. at 1742 (Kennedy, J., concurring).

Justice O'Connor, writing for the four-justice plurality in Pap's, afforded substantial deference to legislative judgments regarding secondary-effects:

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[3]The record before the County Commissioners included testimony presented by a former strip-club manager to the Michigan Legislature in the year 2000 describing how such establishments promote these kinds of illegal activities.

> [I]n terms of demonstrating that such secondary effects pose a threat, the city need not conduct new studies or produce evidence independent of that already generated by other cities to demonstrate the problem of secondary effects, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.

529 U.S. at 296 (emphasis added, quotations omitted); see Jake's. Ltd.. Inc. v. City of Coates, 284 F.3d 884, 886 (8th Cir), cert. denied, 123 S. Ct. 413 (2002). The plurality squarely rejected the dissent's view that the City must come forward with evidence showing that pasties and G-strings reduce crime:

> To be sure, requiring dancers to wear pasties and G-strings may not greatly reduce these secondary effects, but [the four-part O'Brien test] requires only that the regulation further the interest in combating such effects. [T]he city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.

529 U.S. at 301 (plurality opinion) (quotation omitted). The four-Justice plurality in Alameda Books was equally deferential in reviewing a zoning ordinance which had a broader impact on protected First Amendment interests.

Justice Kennedy's concurring opinion in Alameda Books was somewhat less deferential than the plurality to local legislative judgments as to the adverse secondary effects purportedly addressed by zoning regulations. But Justice Kennedy joined the plurality opinions in Barnes as well as Pap's, and he did not even cite those cases in his Alameda Books concurrence, which means there is nothing to suggest that he has retreated from his votes in Barnes and Pap's. In these circumstances, we conclude that the Court's holding in Pap's is still controlling regarding the deference to be afforded local governments that decide to ban live nude dancing. Therefore, Sugar Daddy s failed to cast sufficient doubt on the County's rationale for the Ordinance, and the district court's decision that the ban on live nude dancing is constitutional must be affirmed.[4]

II. Claims That the Ordinance Is Overbroad.

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[4]In its cross-appeal, Benton County argues that two of the district court's findings of fact are clearly erroneous. Neither finding affects our conclusion that the County s ban on live nude dancing survives First Amendment intermediate scrutiny. Accordingly, we need not address these fact-finding issues.

Ordinarily, a party may not facially challenge a law on the ground that it would be unconstitutional if applied to someone else. See New York v. Ferber, 458 U.S. 747, 767 (1982). An exception to that general rule is the First Amendment overbreadth doctrine. To prevent the chilling of protected First Amendment interests, this doctrine permits "an individual whose own speech or conduct may be prohibited to challenge a statute on its face because it also threatens others not before the court - those who desire to engage in legally protected expression but who may refrain from doing so." Ways v. City of Lincoln, 274 F.3d 514, 518 (8th Cir. 2001) (quotation omitted). A judicial declaration that a law is unconstitutionally overbroad "is, manifestly, strong medicine." Broadrickv. Oklahoma, 413 U.S. 601, 613 (1973). Therefore, "where a statute regulates expressive conduct, the scope of the statute does not render it unconstitutional unless its overbreadth is not only real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." Osborne v. Ohio, 495 U.S. 103, 112 (1990) (quotation omitted).

A. Does the Ordinance Chill Legitimate Theater? Sugar Daddy's argues that, even if the

Ordinance is constitutional as applied to live nude dancing, it is unconstitutionally overbroad because its prohibition against the public fondling of genitals chills constitutionally protected conduct. For example, Sugar Daddy's warns that an actor playing the role of the manager in a local production of *Damn Yankees* could be subject to criminal penalties for adjusting his athletic protector.

In Farkas v. Miller, 151 F.3d 900, 905 (8th Cir. 1998), we upheld application of a public nudity statute to prohibit live nude dancing, rejecting an overbreadth argument because the statute included an exception for "a theater, concert hall, art center, museum, or similar establishment.., primarily devoted to the arts or theatrical performances." On the other hand, in Ways, 274 F.3d at 519, in striking down an ordinance more broadly prohibiting sexual contact in entertainment businesses, we noted that among other flaws the ordinance lacked an exception for artistic venues. In this case, the Ordinance has an exemption for "any theatrical production performed in a theater by a professional or amateur theatrical or musical company which has

serious artistic merit." But unlike the exemption in Farkas, this exemption is inexplicably limited to the Ordinance's public-nudity prohibition, so it does not appear to limit the public-genital-fondling prohibition.

An uncontradicted affidavit by the County Attorney avers that there are no theaters in Benton County. Moreover, the County Attorney represents that "it is not the intent of the prosecutorial authority for Benton County to now or in the future enforce the provisions of Ordinance 332 on any theatrical production.., which has serious artistic merit." "In evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court or enforcement agency has proffered." Village of Hoffman Estates v. Flipside. Hoffman Estates. Inc., 455 U.S. 489, 494 n.5 (1982). Thus, the record does not support an inference that protected theatrical activity is presently being chilled, or that the County will ever enforce the genital-fondling prohibition against the cast of a theatrical production. On this record, we agree with the district court that the Ordinance is not substantially overbroad, judged in relation to its

plainly legitimate sweep. Accord J&B Entm't. Inc. v. City of Jackson, 152 F.3d 362, 366-67 (5th Cir. 1998).

B. **The Van Gelders' Right to Privacy Claim.** The Ordinance prohibits nudity and the fondling of genitals "in a public setting or place." The definition of public place includes hotels and motels but specifically excludes "enclosed single sex motel rooms and hotel rooms designed and intended for sleeping accommodations." Limiting the exclusion to "single sex" hotel rooms seems like a dreadful example of bad drafting.[5] Reading the limitation literally, Mark Van Gelder and his wife seek to enjoin enforcement of the Ordinance, to the extent it "criminalizes marital sexual relations within hotel rooms within Benton County," because it infringes their alleged constitutional right to marital and sexual privacy. Pressing literalism to an unreasonable extreme, the Van Gelders further assert that the Ordinance violates their right to equal

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[5]The same linguistic nonsense infected the City of Cannon Falls ordinance upheld against other challenges in Nightclub Mgmt., 95 F. Supp. 2d 1027.

protection because the single sex limitation permits homosexuals but not heterosexuals to engage in sexual relations in hotel rooms.

The complaint alleges that Mr. Van Gelder "fears that.., he and his wife could be subject to criminal prosecution if they engaged in normal marital activities within such a motel or hotel room." But the Van Gelder's have presented no evidence of any likelihood that the Ordinance will be enforced against them if they engage in such activity. Indeed, the Benton County Attorney has publicly declared "that Ordinance 332 does not prohibit nudity, genital touching, or any other sexual activity in private hotel and motel rooms." That declaration finds support in the Minnesota canons of statutory construction, which codify presumptions that "[t]he legislature does not intent a result that is absurd, impossible of execution, or unreasonable [and] does not intend to violate the constitution of the United States or of this state." M1NN. STAT. Sec. 645.17, subd. (1), (3). Thus, the alleged fear is both without support and patently unreasonable.

As a general rule, a federal court should

refrain from entertaining a pre-enforcement constitutional challenge to a state criminal statute in the absence of "a realistic fear of prosecution." Poe v. Ullman, 367 U.S. 497, 508 (1961); see Steffel v. Thompson, 415 U.S. 452,459(1974). The Van Gelders' claim does not raise First Amendment issues, and "the existence of a 'chilling effect, even in the area of First Amendment rights, has never been considered a sufficient basis, in and of itself for prohibiting state action." Younger v. Harris, 401 U.S. 37, 51(1971); see Laird v. Tatum, 408 U.S. 1, 13-14 (1972). On this record, the district court properly dismissed this claim without reaching the merits of the issues.

II. The Custodial Arrest Issue.

In addition to asserting that the Ordinance is unconstitutional on its face, Sugar Daddy's complaint sought an order "declar[ing] the practice of enforcing the ordinance by custodial arrest to be an unlawful prior restraint on First and Fourteenth Amendment rights." Noting that the Ordinance's theatrical exemption requires arresting officers to

determine that a live nude dancing performance lacks "serious artistic merit," the district court permanently enjoined enforcement of the Ordinance by means of custodial arrest because "arresting the performer necessarily places a prior restraint on later performances." Benton County appeals that ruling.

Ordinarily, a federal court will not enjoin enforcement of a state criminal law, even though unconstitutional. "To justify such interference there must be exceptional circumstances and a clear showing that an injunction is necessary in order to afford adequate protection of constitutional rights." Wooley v. Maynard, 430 U.S. 705,712 (1977) (quotation omitted). We conclude that Sugar Daddy's has failed to demonstrate that exceptional circumstances require an injunction against enforcing the constitutional prohibition of live nude dancing by means of custodial arrest.

In the first place, the risk that Sugar Daddy's dancers will be subject to custodial arrest seems minimal. A violation of the Ordinance is a misdemeanor. See MINN. STAT. Sec. 609.02, Subd. 3. The Minnesota Rules of Criminal Procedure require

police officers to proceed against misdemeanor offenders by citation rather than custodial arrest, "unless it reasonably appears to the officer that arrest or detention is necessary to prevent bodily harm to the accused or another or further criminal conduct, or that there is a substantial likelihood that the accused will fail to respond to a citation." MINN. R. CRIM. P. 6.01, Subd. 1(l)(a). Sugar Daddy's has presented no evidence that the County has threatened custodial arrests or will not comply with this rule of criminal procedure.

In the second place, the doctrine of prior restraint is only marginally involved here. The doctrine recognizes "the time-honored distinction between barring speech in the future and penalizing past speech." Alexander v. United States, 509 U.S. 544, 554 (1993). Any custodial arrest will come after a dancer has engaged in live nude dancing (nothing in the record suggests that the county will conduct pre-dance arrests, which would raise more serious First Amendment issues). The district court concluded that a post—dance arrest "places a prior restraint on later performances". But in the absence of proof that a dancer's arrest would be followed by extended custody, the only later performances likely

to be restrained are additional live nude dances that night. See Kew v. Senter, 416 F. Supp. 1101, 1106 (N.D. Tex. 1976) ("Nor are future performances prevented, for the performer may post bail and resume her 'expression' as quickly as logistics permit.").

We conclude there is little risk that a custodial arrest will restrain a dancer's *protected* expressive conduct in later performances that same night. In obscenity cases, the Supreme Court has cautioned that police officers may not seize allegedly obscene materials without some prior judicial evaluation of the obscenity issue. See Roaden v. Kentucky, 413 U.S. 496, 505-06 (1973). This is a prior restraint concern that led the court to deny a motion to dismiss a suit to enjoin the arrest of exotic dancers under an obscenity ordinance in Admiral Theatre v. City of Chicago, 832 F. Supp. 1195 (N.D. Ill. 1993). The district court relied on Admiral Theatre, noting that officers must assess whether a performance has "serious artistic merit" to determine whether the Ordinance s theatrical exception applies. We disagree. While "serious artistic merit" is a component of obscenity jurisprudence, see Miller v. California, 413 U.S. *15,*

24 (1973), the Ordinance is not obscenity-based. The Ordinance s exception applies only to a "theatrical production performed in a theater by a professional or amateur theatrical or musical company." Thus, an arresting officer will know to a virtual certainty whether a particular live nude performance at Sugar Daddy's falls within the exception. If not, the Ordinance has been violated, and any similar performances later that evening would also violate the Ordinance.

In these circumstances, we see no exceptional circumstances warranting pre-enforcement intrusion by a federal court of equity. Any prior restraint issues that may arise should the County elect to enforce the Ordinance through custodial arrest are better left for the state courts to resolve on a specific factual record.

The judgment of the District Court is reversed, and the case is remanded with directions to vacate the permanent injunction against "using custodial arrest as a means of enforcing Benton County Ordinance 332 against Plaintiffs or any other person." 171 F. Supp. 2d at 985. In all other

respects, the judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

IUNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

SOB, INC., a Minnesota corporation, d/b/a "Sugar Daddy's; AMY CHENOWETH; SHANNON WIBORG; KATHRYN HASKINS; MARK VAN GELDER; and MARY CLIFFORD) VAN GELDER,

Plaintiffs,

vs.

COUNTY CF BENTON,

Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER FOR JUDGMENT

Randall Tigue Law Office, P.A., by RANDALL D.B. T1GUE, Minneapolis, Minnesota, appeared on behalf of Plaintiffs.

Ratwik, Roszak & Maloney, P.A., by SCOTT T. ANDERSON and AMY E. MACE, Minneapolis, Minnesota, appeared on behalf of Defendant.

This matter was before the Court on September 11, 2001, for a combined hearing pursuant to Fed.R.Civ.P. 65(a)(2) on Plaintiffs application for a preliminary injunction and a trial on the merits. Based on the arguments and memoranda of counsel, the evidence in the record, and the applicable law, the Court makes the following

FINDINGS OF FACT

1. Defendant County of Benton (hereinafter 'Benton County") is a political subdivision of the State of Minnesota.

2. A business called "The King's Inn" opened in Benton County in September1993. The King's Inn offered live, nude dance entertainment to the public.

3. Shortly after The King's Inn opened, Benton County unsuccessfully sought to enforce a conditional use permit requirement against The King's Inn.1 Benton County in July 1994 then passed a zoning ordinance limiting the location of sexually-oriented businesses[2]. In enacting the zoning ordinance, the Benton County Commissioners considered studies of the effects of sexually-oriented businesses on the neighborhoods surrounding those businesses. Those studies were conducted in St. Paul and Rochester, Minnesota; Los Angeles, California; Phoenix, Arizona; Adams County, Colorado; and Austin, Texas. The Benton County Commissioners also considered a report the Minnesota Attorney General's Office had prepared on the same subject. Those studies and reports suggest, in varying degrees, that sexually-oriented businesses may cause an increase in crime rates, a

1Another judge in this District granted a preliminary injunction against enforcement of the conditional use permit requirement,

Rukaka. Inc. v. County of Benton, 852 F. Supp. 807 (D. Minn.1993). and later imposed a permanent injunction based on the lack of procedural safeguards in the county code. Mga Susu. Inc. v. County of Benton, 853 F. Supp. 1147 (D. Minn. 1994).

decrease in property values, and other adverse secondary effects in the areas surrounding those businesses.

4. Plaintiff SOB, Inc., is a Minnesota corporation. In June 2001, SOB, Inc., opened a business called "Sugar Daddy's" in a location available for sexually-oriented businesses under Benton County's zoning scheme, Sugar Daddy's offers live, nude dance entertainment to the public. Plaintiffs Amy Chenoweth, Shannon Wiborg, and Kathryn Haskins are Minnesota residents who work as exotic dancers at Sugar Daddy's and who perform in the nude.

5. Plaintiffs Mark and Mary Clifford Van Gelder are a married couple and are Minnesota residents.

6. Within a week of the opening of Sugar Daddy's, the Benton County Attorney, in a response to a request from Benton County Commissioners for additional means of regulating sexually-oriented businesses, presented the Benton County Commissioners with a draft

[2] The Minnesota courts have upheld Benton County's

zoning scheme against a First Amendment challenge. Kismet Investors, Inc. v. County of Benton, 617 N.W.2d 85 (Minn Ct.App, review denied (Mimi. Nov. *15,2000),* pet. for cert. filed, 69U.S.L.W. 3576 (Feb. 13, 2001) (No. 00- 1305).

ordinance prohibiting "public indecency." The Benton County Attorney at the same time provided the Benton County Commissioners with copies of the studies relied upon in enacting the earlier zoning ordinance along with copies of similar studies conducted in New York, New York; St. Croix County, Wisconsin, and St. Paul, Minnesota. The additional studies reach conclusions consistent with those of the studies Benton County considered in enacting the earlier zoning ordinance.

7. The Benton County Commissioners held a public hearing on the proposed public indecency ordinance on July 3, 2001. At that hearing, the Benton County Commissioners received written and oral comments from both proponents and opponents of the proposed ordinance. Plaintiff Mark Van Gelder presented the Benton County Commissioners with a study disputing the link between sexually-oriented businesses and adverse secondary effects. Van Gelder also presented evidence suggesting that the businesses offering live, nude entertainment in Benton County had no demonstrable adverse

effects upon local crime rates or property values.

8. The Benton County Commissioners adopted the proposed ordinance as Benton County ordinance 332 (hereinafter "the Ordinance") immediately following the public hearing by a vote of 4-1. A copy of the Ordinance is attached to Plaintiffs' Complaint and is part of the record. The Ordinance as adopted prohibits a person from appearing in a state of nudity in public, ordinance Section 4-.A., and from fondling his or her own genitals or the genitals of another person in public. Id. at Section 4.B.,C.

9. The presence of businesses offering live, nude entertainment in Benton County has not adversely affected property values or increased crime in the areas near those businesses.

10. Benton County's motivation in adopting the Ordinance was to disrupt or eliminate businesses in Benton County that offer live, nude entertainment.

11. To the extent that any of the Court's conclusions of law are deemed to be findings of fact, those findings are incorporated herein by reference.

CONCLUSIONS OF LAW

1. The Supreme Court has recognized that the First Amendment protects nude erotic dancing as a form of artistic expression. See City of Erie v. Pap's A.M., 529 U.S. 277, 285 (2000) (plurality opinion) (citing cases). A majority of the Supreme Court also has recognized that legislative prohibitions of public nudity receive intermediate judicial scrutiny pursuant to the test articulated in United States v. O'Brien. 391 U.S. 367 (1968), because such prohibitions may interfere incidentally with protected expression, Pap's, 529 U.S. at 289 (four-justice plurality); Id. at 310 (Souter, .J., concurring in part and dissenting in part). An ordinance passes muster under O Brien if the ordinance is a valid exercise of the government's police power, the ordinance furthers an important or substantial governmental interest, that interest is unrelated to the suppression of free expression, and the incidental restriction on expression is no greater than necessary to further that interest. 391 U.S. at 376-77.

2. Plaintiffs do not dispute that the enactment of the Ordinance was a valid exercise of Benton County's lawful authority.

3. The Supreme Court's decision in Pap's does not call into question Benton County's stated justification for enacting the Ordinance, which is to eliminate the adverse secondary effects of sexually-oriented businesses. Plaintiffs contend that Benton County's interest in eliminating the adverse secondary effects of nude dancing is not "important or substantial" under O'Brien because a majority of the Supreme Court has rejected that position. Some Justices in Pap's indeed were skeptical that requiring dancers to wear minimal amounts of clothing would have an appreciable effect upon the secondary effects of sexually-oriented businesses that offered nude dancing. 529 U.S. at 310 (Scalia, J., concurring in the judgment; Id. at 323 (Stevens, J., dissenting). Five Justices in Pap's, however, agreed as a general matter that a local government's interest in combating the adverse secondary effects of sexually-oriented businesses is "important or substantial" under O'Brien. See Nightclub Mgmt.. Ltd. v. City of Cannon Falls, 95 F. Supp.2d 1027, 1041 n.17 (D. Minn. 2000) (discussing the treatment of secondary effects in Pap's). The Eighth Circuit also has held affirmatively that such an interest passes muster under O'Brien.

Farkas v. Miller, 151 F.3d 900, 905 (8th Cir. 1998), and recently reaffirmed the viability of the secondary effects doctrine in the context of zoning ordinances. BZAPS. Inc. v. City of Mankato, No. 00-3214, 2001 WL 1203229, at *2 (8th Cir. Oct. 12, 2001). The Ordinance accordingly furthers an important or substantial governmental interest.

4. Benton County's motivation to suppress constitutionally protected expression does not raise the level of judicial scrutiny applied to the Ordinance. As Plaintiffs argue, the record amply demonstrates that Benton County passed the Ordinance in order to eliminate nude dancing at Sugar Daddy's and similar establishments[3]. The Benton County Attorney proposed the Ordinance as a constitutionally acceptable means of regulating sexually-oriented businesses, not as a general prohibition of public indecency. The record contains no complaints to the Benton County Commissioners about campus streakers, topless vendors, nude sunbathers, or any form of public nudity other than nude dancing. The comments at the public hearing, both for and against the Ordinance, focus almost

entirely upon the issue of nude dancing. In light of those facts, it is disingenuous to suggest that an abstract concern with nonexistent adverse secondary effects of sexually-oriented businesses, rather than concrete complaints about the moral value of nude dancing, motivated Benton County to pass the Ordinance, Contrary to Plaintiffs' argument, however, Benton County's motivation is not dispositive. Although in most instances laws intended to target protected expression receive heightened scrutiny, laws targeting nude dancing receive intermediate scrutiny so long as the court can identify "a current governmental interest in the service of which the statute may be constitutional." Farkas, 151 F.3d at *905* (quoting Barnes v. Glen Theater, Inc. 501 U.S. 560, 582 (1991) (Souter, J., concurring) (ellipsis in original)). See also Schultz v. City of Cumberland, 228 F.3d 831, 841 (7th Cir-. 2000 (holding that general prohibitions of public nudity receive intermediate scrutiny when the "government offers as

3Benton County has offered affidavits from some Benton County Commissioners in an effort to explain the reasons underlying passage of the Ordinance. Plaintiffs objected to this evidence on the ground that affidavits from individual Commissioners are not competent to prove motivation for

the entire legislative body. Most federal courts, however, have held in similar contexts that self-serving evidence from individual legislators is admissible but is entitled to little weight. Mitchell v. Comm'n on Adult Enterm't Establishments of the State of Del, 10 F.3d 123, 135 (3rd Cir. 1993) (citing cases). The Court accordingly overrules Plaintiff objection, and the affidavits of the Commissioners are admitted as part of the evidentiary record.

its legislative justification the suppression of public nudity s negative secondary effects"). Because Benton County has such an interest, the Ordinance is "unrelated to the suppression of free expression." Farkas 151 Ed at 905 (Citation omitted).

5. Benton County also has met its burden of establishing a factual basis for its interest in combating the adverse secondary effects of nude dancing. Plaintiffs point out, correctly, that Benton County failed to establish more than a general concern, with adverse secondary effects and that Benton County ignored evidence that nude dancing in fact had caused no local adverse secondary effects.

Courts in other jurisdictions have accepted versions of these arguments in striking down adult entertainment ordinances. The Ninth Circuit for example, has held that a city cannot constitutionally increase restrictions on sexually-oriented businesses simply by showing that "adult establishments as a class cause the secondary effects the regulation is aimed at preventing," Alameda Books, Inc. v. City of Los Angeles. 222 F.3d 719, 727 (9th Cir. 2000), cert. granted, 121 S.Ct. 1223 (2001). The Eleventh Circuit similarly has held that a county constitutionally cannot reject its own study finding no adverse secondary effects within its boundaries "in favor of studies from different cities and different time periods that reach different conclusions. Flanigan's Enters.. Inc. v. Fulton County, 242 F.3d 976, 987 (11th Cir.), pet. for cert. filed, 70 U.S.L.W. 3091 (Jul. 23, 2001) (No. 01-144). The concern underlying those cases, a concern the Plaintiffs share, is that without a meaningful

evidentiary burden local governments effectively may eliminate protected expression simply through a ritualistic invocation of dubious studies. Although that concern is reasonable, it again is not in accord with the rule in this jurisdiction. The Eighth Circuit has upheld adult entertainment ordinances passed in the absence of a showing of local adverse secondary effects, BZAPS, 2001 WL 1203229, at and in the absence of any showing whatsoever that the government intended to combat adverse secondary effects. Farkas, 151 F.3d at 905. See also ILQ Invs., Inc. *v.* City of Rochester, 25 F.3d 1413, 1418 (8th Cir.) (holding that an adult entertainment ordinance may be justified "by studies of the secondary effects of reasonably similar businesses" in other areas), cert. denied, 513 U.S. 1017 (1994). The studies Benton County considered in passing the Ordinance are sufficient to meet Benton County's evidentiary burden under that relatively lenient standard.

6. The Ordinance is not unconstitutionally overbroad. The First Amendment overbreadth doctrine allows challenges to legislative prohibitions on speech or conduct on the ground that those prohibitions may have a chilling effect upon the protected expression of persons other than the plaintiff. Bd. of Airport Comm'rs v. Jews for Jesus. Inc., 482 U.S. 569, 574 (1987). Plaintiffs here recognize that the Ordinance contains an exemption[4] applicable to "any theatrical

production performed in a theater by a professional or amateur theatrical company which has serious artistic merit." Ordinance Section 5. Plaintiffs, however, also point out that the exemption does not apply to the Ordinance's prohibition of genital fondling, Ordinance Section 4 B, C, and that such a prohibition could be construed as applying to scenes in mainstream theatrical performances. The Court agrees that Benton County may not proscribe particular gestures, including gestures expressing a message of eroticism, in the

4At least one court has held that a prohibition on public nudity without a so-called "theatrical exemption" was unconstitutionally overbroad because the ordinance on its face prohibited "live performances with serious literary, artistic, or political value." Triplett Grille, Inc. v. City of Akron. 40 F.3d 129, 136 (6th Cir. 1994). A theatrical exemption substantially similar to the exemption in the Ordinance, however, insulates a prohibition of public nudity from an attack based on overbreadth. Farkas, 151 F.3d at 905.

context of a theatrical performance. See Schultz v. City of Cumberland, 228 F.3d 831, 847 (7th Cir. 2000) (holding that a city may not prohibit sexually explicit dance movements as a means of regulating sexually- oriented businesses). But to hold the Ordinance infirm on the ground of overbreadth, the overbreadth "must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." Veneklase v. City of Fargo, 248 F.3d 738, 747 (8th Cir. 2001) (en banc) (quoting Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973)), cert. denied, 69 U.S.L.W,

3749 (U.S. Oct. 1, 2001) (No, 00-1712), An ordinance also is not overbroad if it is amenable to a limiting construction that would preserve the ordinance's constitutionality. Broadrick, 413 U.S. at 613. The number of theatrical productions to which the prohibition of genital fondling would apply is extremely limited, and courts in later cases could construe the Ordinance in such a way as to preserve protected expression should the occasion arise. The Ordinance's definition of 'public place," Ordinance Section 3 C., which according to Plaintiffs could be interpreted as extending to private hotel rooms, similarly is subject to a limiting construction and therefore is not substantially overbroad. More specific challenges to the Ordinance on the grounds Plaintiffs raise are best reserved for decision on a case-by-case basis.

7. Finally, Plaintiffs are entitled to an injunction forbidding enforcement of the Ordinance by means of custodial arrest.

Plaintiffs argue that the custodial arrest of erotic dancers constitutes an unlawful prior restraint of protected expression. Prior restraints on expressive conduct are presumptively invalid, Douglas v. Brownell,. 88 F.3d 1511,1521(8th Cir. 1996), and are to be prohibited if state officials retain "too much discretion to discriminate against disfavored speech or unpopular speakers." Steele v. City of Bemidji, 257 F.3d 902, 907 (8th Cir.2001). Federal district courts are not in accord concerning whether the arrest of an erotic dancer following an allegedly illegal performance constitutes an unlawful prior restraint of expression. Compare e.g. Admiral Theatre v. City of Chicago, 832 F.Supp. 1195, 1204 (N.D. 111. 1993) (holding that nude dancers who alleged that they were arrested after performing had stated a claim for unlawful prior restraint) Kew.v Senter, 416 F.Supp. 1101, 1105-06 (N.D.Tex. 1976) (holding that arresting nude dancers after completion of performance was

not an unlawful prior restraint). Benton County contends that enforcing the Ordinance cannot present a prior restraint problem because officers enforcing the Ordinance need little discretion to determine whether a dancer is performing in the nude. Given that the theatrical exception in the Ordinance may apply to some erotic dance performances, however, officers enforcing the Ordinance also must determine whether such a performance has "serious artistic merit," Ordinance Section 5, and the scope of that inquiry is far from clear. The merits of an expressive performance, insofar as a court can determine them, turn upon the particular facts of each performance, and arresting the performer necessarily places a prior restraint on later performances.

8. To the extent that any of the Court's findings of fact are deemed to be conclusions of law, those conclusions are incorporated herein by reference.

For the foregoing reasons, the Court makes

the following:

ORDER

1. The Clerk of Court shall enter judgment as follows:

IT IS ORDERED, ADJUDGED, and DECREED that Plaintiffs' motion for a permanent injunction prohibiting enforcement of Benton County Ordinance 332 in its entirety is DENIED, and that claim is DISMISSED with prejudice.

2. Plaintiffs' motion for a permanent injunction prohibiting Benton County from enforcing Benton County Ordinance 332 by means of custodial arrest is GRANTED, arid an injunction shall issue forthwith in the form attached without the filing *of* security therefor.

Dated: November 5, 2001

DONALD D. ALSOP, Senior District Judge
United States District Court

Court File No. 01-CV-1239 DDARLE

SOB, Inc., et al.,

Plaintiffs,

v. PERMANENT INJUNCTION

County of Benton,

Defendant.

Defendant County of Benton, along with its officers, agents, servants, employees, and attorneys, is hereby PERMANENTLY ENJOINED from using custodial arrest as a means of enforcing Benton County Ordinance 332 against Plaintiffs or any other person.

Dated. November _2001

DONALD D. ALSOP, Senior District Judge United States District Court

No. 01—3928/01-4022

SOB, Inc., etc., et al.,

Appellants/Cross-Appellees,

v.

County of Benton,

Appellee/Cross-Appellant.

ORDER DENYING PETITION FOR REHEARING AND FOR REHEARING EN BANC.

The petition for rehearing en for rehearing by the panel is also order Denying Petition for Rehearing and for Rehearing en banc is denied. The petition for rehearing by the panel is also denied.

February 27, 2003

U.S. CONSTITUTION, AMENDMENT 1:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONSTITUTION, AMENDMENT 14, SEC. 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

A.54

Benton County Minnesota
Ordinance No.____

AN ORDINANCE PROHIBITING PUBLIC INDECENCY AND PROVIDING A CRIMINAL PENALTY

THE COUNTY OF BENTON COUNTY ORDAINS:

Section 1. Purpose. The purpose of this ordinance is to prohibit public indecency in order to deter criminal activity, to promote societal order and public health, and to protect children.

Section 2. Findings. The Benton County Board of Commissioners makes the following findings regarding the need to prohibit public indecency:

A. Public indecency can increase the incidence of criminal activity, including but not limited to prostitution, disorderly conduct and sexual assault.

B. Pubic indecency can expose children to an unhealthy and nurtureless environment.

C. Public indecency can disrupt the orderly operation of public events and public accommodations, thereby fostering societal disorder.

D. Public indecency can present health concerns in places of pubic accommodation and other public settings.

Section 3. Definitions: The following words and terms when used in this ordinance shall have the following meaning, unless the context clearly indicates otherwise:

A. "Nudity" means:

(1) The appearance of a human bare buttock, anus, male genitals, female genitals, or female breast; or

(2) A state of dress which fails to opaquely cover a human buttock, anus, male genitals, female genitals or areola of the female breast.

B. "Person" - a natural person twelve (12) years of age or older, including employees or agents of a public accommodation.

C. "Public "Place" means any location frequented by the public, or where the public is present or likely to be present, or where a person may reasonably be expected to be observed by members of the public. Pubic places include, but are not limited to, streets, sidewalks, parks, beaches, business and commercial establishments (whether for profit or not for-profit, and whether open to the public at large or where entrance is limited by a cover charge or membership requirement), bottle clubs, hotels, motels, restaurants, night clubs, country clubs, cabarets and meeting facilities utilized by any religious, social fraternal or similar organization. Premises used solely as a private public place shall not include enclosed single sex public restrooms, enclosed single sex motel rooms and hotel rooms designed and intended for sleeping accommodations, doctor's offices, portions of hospitals and similar places in which nudity or exposure is necessarily and customarily expected outside of the home and the sphere of privacy constitutionally protected therein; nor shall it include a person appearing in a state of nudity in a modeling class operated by: (1) a proprietary school, licensed by the State; a college, junior college or university

supported entirely or partly by taxation; or (2) a private college or university which maintains and operates educational programs in which credits are transferable to a college, junior college or university supported entirely or partly by taxation or an accredited private college.

Section 4. Public Indecency Prohibited. A person, who knowingly or intentional in a pubic setting or place:

A. Appears in a state of nudity;
B. Fondles the genitals of himself or herself, or
C. Fondles the genitals of another person;

commits public indecency and is guilty of a misdemeanor under Minnesota law and upon conviction thereof, shall be punished by a fine of up to $1,000 or by imprisonment for up to 90 days, or both.

Section 5. Exclusion. The provisions of Section 4.A of this ordinance shall not apply to any theatrical production performed in a theater by a professional or amateur theatrical or musical company which has serious artistic merit.

Section 6. Severability. If any section, sentence or clause or phrase of this ordinance is for any reason held to be invalid, such decision shall not affect the validity of the remaining portions of this ordinance. The County Board hereby declares that it would have adopted the section, sentence, clause, or phrase of this ordinance irrespective of the fact that any one or more sections, sentences, clause or phrases be declared invalid.

Section 7. Effective Date. This ordinance shall be effective immediately upon its passage and publication.

ADOPTED this_____day of_____,
by the Benton County Board of Commissioners.

BY: _____
Chair
Benton County Board of Commissioners.

ATTEST:

_____
Clerk
Benton County Board of Commissioners

A.55

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

SOB, Inc., a Minnesota corporation, d/b/a "Sugar Daddy's"; Amy Chenoweth; Shannon Wiborg; Kathryn Haskins; Mark Van Gelder; and Mary Clifford Van Gelder,

COMPLAINT

Plaintiffs,

vs.

County of Benton,

Defendant.

Court File No.

JURISDICTION

1. The jurisdiction of this Court is invoked under the laws of the United States, and, in particular, Title 28 U.S.C. Sec. 1343(3), 2201 and 2202; Title 42 U.S.C. Sec. 1983 and the Constitution of the United States, in particular, under the First, Fourth, Fifth, Eighth, Ninth, and Fourteenth Amendments thereto, this being an action authorized by law to redress the

deprivation, under color of state law, statute, ordinance, regulation, custom and usage or rights, privileges and immunities guaranteed to Plaintiffs under the Constitution of the United States.

PARTIES

2. Plaintiff SOB, Inc., is a corporation organized under the laws of the State of Minnesota, at all times pertinent to this lawsuit, it has operated and continues to operate a business known as 'Sugar Daddy's," located at 500 NW 66th Street in unincorporated Benton County, Minnesota.

3. Plaintiffs Amy Chenoweth, Shannon Wiborg, and Kathryn Haskins are citizens of the United States and of the State of Minnesota. At all times pertinent to this lawsuit, said Plaintiffs perform as exotic dancers at "Sugar Daddy's."

4. Plaintiffs Mark Van Gelder and Mary Clifford

Van Gelder are citizens of the United States and of the State of Minnesota. They are husband and wife.

FACTUAL BACKGROUND

5. At all times pertinent to this lawsuit, Plaintiff SOB, Inc., has operated a business known as 'Sugar Daddy's," at 500 NW 66th Street, in unincorporated Benton County, said business being open to the public offering non-alcoholic beverages for sale and non-obscene live nude dance entertainment.

6. At all times pertinent to this lawsuit, Plaintiffs Chenoweth, Wiborg, and Haskins have worked and continue to work at "Sugar Daddy's," providing live, non-obscene nude dance entertainment.

7. As a result, Plaintiffs' activities are presumptively entitled to protection under the free

speech provisions of the First and Fourteenth Amendments to the United States Constitution.

8. On July 3, 2001, the Benton County Board of Commissioners enacted an ordinance prohibiting so-called "public indecency." A copy of said ordinance is attached hereto as Exhibit A and incorporated by reference as if fully set forth herein.

9. The term "public indecency" is defined in the new ordinance as follows:

> "A person, who knowingly or intentionally in a public setting or place:
>
> a. Appears in a state of nudity;
>
> b. Fondles the genitals of himself or herself; or
>
> c. Fondles the genitals of another person;
>
> d. Commits public indecency and is guilty of a misdemeanor under Minnesota law."

The term "public place" is defined in the ordinance as

follows:

> "'Public Place' means any location frequented by the public or where the public is present or likely to be present, or where a person may reasonably be expected to be observed by members of the public. Public places include, but are not limited to, streets, sidewalks, parks, beaches, business and commercial establishments (whether for profit or non-profit and wether open to the public at large or where entrance is limited by a cover charge of membership requirement) bottle clubs, hotels, motels, restaurants, nightclubs, country clubs, cabarets and meeting facilities utilized by any religious, social fo- ternal or similar organizations. Premises used solely as a private residence whether permanent or temporary in nature shall not be deemed a public place. Public place shall not include enclosed single sex public restrooms, enclosed single sex motel rooms designed and intended for sleeping accommodations, doctor's offices, portions of hospitals and similar places in which nudity or exposure is necessarily and customarily expected outside the home and the sphere of privacy and constitutionally protected therein; nor shall it include a person appearing in a state of nudity in a modeling class operated by:
>
> (1) a proprietary school, licensed by the state;
>
> (2) a college, junior college, or

university supported entirely or partly by taxation;

(3) a private college or university which maintains and operates educational programs in which credits are transferable to a college, junior college or university supported entirely or partly by taxation or in a credited private college."

10. Subdivision 5 excludes from the provision thereof "any theatrical production performed in a theater by a professional or amateur theatrical or musical company which has serious artistic merit."

11. In enacting the foregoing provisions, Defendant acted under color of state law, statute, ordinance, regulation, custom or usage, within the meaning of Title 42 U.S.C. Sec. 1983.

12. Benton County has been the home to one or more adult entertainment establishments

featuring live nude dance entertainment since at least September of 1993.

13. In enacting the ordinance, Defendant County of Benton received absolutely no evidence whatsoever that either adult entertainment establishment within the County of Benton was the cause of any adverse secondary effects in the surrounding community, such as a decline in property values or an increase in crime in the surrounding neighborhood.

14. Quite to the contrary, in enacting the ordinance, the Board of Commissioners of Defendant County of Benton acted in the face of uncontradicted evidence that neither adult entertainment facility operating in the County of Benton has caused any adverse secondary effects, including uncontradicted evidence that:

1. Property values in the area surrounding the adult entertainment facilities were rising at a rate higher than Benton

County as a whole and substantially higher than property values surrounding comparable commercial establishments not featuring adult entertainment.

2. The adult entertainment facilities were not causing in increase in crime or an undue strain on law enforcement resources; quite to the contrary, the uncontradicted evidence considered by the Benton County Board of Commissioners was that the adult entertainment facilities demanded no more police attention than comparable commercial facilities not featuring adult entertainment, and that there was no evidence that the adult entertainment facilities had resulted in any arrests for

drugs, prostitution, or any sex offenses.

15. Plaintiff Chenoweth, Wiborg, and Haskins all perform in total nudity and are thus subject to criminal prosecution under the ordinance.

16. On July 6, 200[illegible], an article, a copy of which is attached hereto as Exhibit B, appeared in the St. Cloud Times wherein the Benton County attorney was quoted as saying the County Sheriff was considering the option of enforcing the public indecency ordinance by custodial arrests of dancers "if they believe the person would continue to violate the ordinance..."

17. In addition to managing the "Sugar Daddy's" business, Plaintiff Mark Van Gelder is a married man who wishes to bring his spouse, Plaintiff Mary Clifford Van Gelder to hotel rooms located within Benton County, but fears that, under the plain language of the ordinance, he and his wife would be subject to criminal

prosecution if they engaged in normal marital activities within such a motel or hotel room.

COUNT I - UNCONSTITUTIONALITY OF ORDINANCE UNDER FIRST AMENDMENT

18. Plaintiffs reallege the allegations set forth in paragraphs 1-17, supra.

19. Because the Benton County ordinance is content-based censorship and not premised upon any legitimate concern over adverse secondary effects and because it is unconstitutionally overbroad, the ordinance is facially unconstitutional under the First and Fourteenth Amendments to the United States Constitution.

COUNT II - INVASION OF RIGHT TO PRIVACY

20. Plaintiffs reallege the allegations set forth in paragraphs 1-19, supra.

21. To the extent that the ordinance, on its face, criminalizes marital sexual relations within hotel rooms within Benton County, the ordinance

violates Plaintiffs Mark and Mary Clifford Van Gelder's right to sexual and marital privacy, as guaranteed by the First, Fourth, Fifth, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution.

22. To the extent that the ordinance, on its face, permits such sexual relations in same sex hotel rooms, but prohibits such activity in hotel and motel rooms occupied by people of the opposite sex, the ordinance deprives heterosexuals equal protection of the laws, in violation of the Fourteenth Amendment to the United States Constitution.

COUNT III - UNLAWFUL PRIOR RESTRAINT ON FREE EXPRESSION

23. Plaintiffs reallege the allegations set forth in paragraphs 1-22, supra.

24. To the extent that Defendant enforces the public indecency ordinance through means

of custodial arrests of dancers, the conduct constitutes an unlawful prior restraint on constitutionally protected expression, in violation of the First and Fourteenth Amendments to the United States Constitution.

EQUITY AND IRREPARABLE INJURY

25. Plaintiffs reallege the allegations set forth in paragraphs 1-24, supra.

26. Plaintiffs have no adequate remedy at law.

27. Unless enforcement of the ordinance is temporarily and permanently enjoined,

Plaintiffs will face irreparable injury to rights guaranteed under the First and Fourteenth Amendments to the United States Constitution.

WHEREFORE, Plaintiffs request the judgment and decree of this Court as follows:

a. That this Court enter a declaratory judgment declaring the public indecency ordinance to be

facially unconstitutional under the First and Fourteenth Amendments to the United States Constitution.

b. That, even assuming the ordinance were facially valid, that the Court declare the practice of enforcing the ordinance by custodial arrest to be an unlawful prior restraint on First and Fourteenth Amendments rights.

c. That this Court enter a preliminary and permanent injunction, and until a hearing on a preliminary injunction can be had, a temporary restraining order restraining and enjoining Defendant from taking any action to enforce the public indecency ordinance against Plaintiffs or, in the alternative, against enforcing said ordinance by means of custodial arrest.

d. That Plaintiffs be awarded their reasonable

costs, disbursements and attorney's fees, pursuant to Title 42 U.S.C. Sec. 1988.

e. That this Court grant such other and further relief as it may deem just, fair, and equitable.

RANDALL TIGUE LAW OFFICE, P.A.

Randall D.B. Tigue
Atty ID No. 110000
Attorney for Plaintiffs
Karmel Square Bldg., Suite 9
2940 Pillsbury Avenue South
Minneapolis, MN 55408
612/825-0936

Dated: July 6, 2001

A 69

VERIFICATION

STATE OF MINNESOTA)
)SS
COUNTY OF HENNEPIN)

Colleen Prinzing, being first duly sworn on oath, hereby deposes and says that she is the President of SOB, Inc., one of the Plaintiffs in the above-entitled matter; that she has read the foregoing Complaint, and that the allegations contained therein are true, except as to those matters stated upon information and belief, and that, with respect to such matters, she believes them to be true.

_____
Colleen Prinzing

Subscribed and sworn to
before me this_____day
of July, 2001

_____
Notary Public

A.70

VERIFICATION

STATE OF MINNESOTA)
)SS
COUNTY OF HENNEPIN)

Amy Chenoweth, being first duly sworn on oath, hereby deposes and says that she has read the foregoing Complaint, and that the allegations contained therein are true, except as to those matters stated upon information and belief, and that, with respect to such matters, she believes them to be true.

_____
Amy Chenoweth

Subscribed and sworn to
before me this_____day
of July, 2001

_____
Notary Public

A-71

VERIFICATION

STATE OF MINNESOTA)
)SS
COUNTY OF HENNEPIN)

Shannon Wiborg, being first duly sworn on oath, hereby deposes and says that she has read the foregoing Complaint, and that the allegations contained therein are true, except as to those matters stated upon information and belief, and that, with respect to such matters, she believes them to be true.

_____
Shannon Wiborg

Subscribed and sworn to
before me this_____day
of July, 2001

_____
Notary Public

A.72

VERIFICATION

STATE OF MINNESOTA)
)SS
COUNTY OF HENNEPIN)

Kathryn Haskins, being first duly sworn on oath, hereby deposes and says that she has read the foregoing Complaint, and that the allegations contained therein are true, except as to those matters stated upon information and belief, and that, with respect to such matters, she believes them to be true.

_____
Kathryn Haskins

Subscribed and sworn to
before me this_____day
of July, 2001

_____
Notary Public

VERIFICATION

STATE OF MINNESOTA)
)SS
COUNTY OF HENNEPIN)

Mark Van Gelder, being first duly sworn on oath, hereby deposes and says that he has read the foregoing Complaint, and that the allegations contained therein are true, except as to those matters stated upon information and belief, and that, with respect to such matters, he believes them to be true.

_____
Mark Van Gelder

Subscribed and sworn to
before me this_____day
of July, 2001

_____
Notary Public

A.74

VERIFICATION

STATE OF MINNESOTA)
)SS
COUNTY OF HENNEPIN)

Mary Clifford Van Gelder, being first duly sworn on oath, hereby deposes and says that she has read the foregoing Complaint, and that the allegations contained therein are true, except as to those matters stated upon information and belief, and that, with respect to such matters, s he believes them to be true.

_____

Mary Clifford Van Gelder

Subscribed and sworn to
before me this_____day
of July, 2001

_____

Notary Public

A.75

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

SOB, Inc., a Minnesota corporation, d/b/a "Sugar Daddy's"; Amy Chenoweth; Shannon Wiborg; Kathryn Haskins; Mark Van Gelder; and Mary Clifford Van Gelder,

Plaintiffs,

AFFIDAVIT OF MARK VAN GELDER

vs.

County of Benton,

Defendant.

Court File No.

STATE OF MINNESOTA)
)SS
COUNTY OF HENNEPIN)

Mark Van Gelder, being first duly sworn on oath, hereby deposes and says the following

1. Your affiant is self-employed and provides management services to various companies.

2. Among the companies to which your affiant

provides service if Plaintiff SOB, Inc. Your affiant provides management services in the operation of the "Sugar Daddy's" adult cabaret.

3. In your capacity as a manager of "Sugar Daddy's," your affiant attended a public hearing of the Benton County Board of Commissioners held July 3, 2001, the purpose of which was to consider the adoption of the public indecency ordinance which is the subject of the present lawsuit.

4. At the hearing, your affiant ascertained that the county staff had provided to the Board of Commissioners various purported "studies" of the secondary effects of adult entertainment, including the following:

a. The adult entertainment study of the Department of City Planning of the City of New York in 1994.

b. The St. Cloud Planning Department study of regulation of adult entertainment establishments in St. Croix County, dated September, 1993.

c. The Adams County Sheriff's Department study dated 6/20/91.

d. The report of the Attorney General's Working Group on the regulation of sexually oriented businesses, dated June 6, 1989.

e. A study, dated April, 1978, entitled "Neighborhood Deterioration and the Location of Adult Entertainment Establishments in St. Paul."

f. An adult business study of Phoenix, Arizona, dated May 25, 1979.

g. St. Paul's 40-acre study, dated 1987.

h. The Los Angeles Department of City Planning's Study of the effects of the concentration of adult entertainment establishments in the City of Los Angeles, dated June 1977.

i. A report on the secondary effects of the concentration of adult use establishments in the Times Square

area, dated April, 1994.

j. A report entitled "Adult Entertainment Businesses in Indianapolis," dated 1984.

k. The adult entertainment study prepared by the City of Rochester in March of 1988.

l. The Austin City Council study entitled "Report on Adult Oriented Businesses in Austin," dated May 19, 1986.

5. Your affiant personally testified before the Benton County Board of Commissioners. At that time, your affiant presented to the Benton County Board of Commissioners copies of two written documents:

a. A copy of the article Paul, Linz and Shafer, "Government Regulation of 'Adult' Businesses through Zoning and Anti-Nudity Ordinances: Debunking the Legal Myth of Negative Secondary Effects," 6 Comm. & L. & P. 355 (June, 2001), a copy of which is attached hereto as Exhibit A. The

article analyzes all of the foregoing adult entertainment studies an establishes the total lack of reliability in any of those studies.

b. A copy of an article appearing in Exotic Dancer Bulletin, a national trade magazine for the exotic dance industry, indicating the total failure of an ordinance such as the present indecent conduct ordinance in the City of Cannon Falls. A copy of said article is attached hereto as Exhibit B.

c. Copies of property value statistics indicating the change in property values from 1994 to 2001 for properties surrounding "Sugar Daddy's," and "King's Inn," both of which feature adult entertainment, and change in property values for the areas surrounding "D.J.'s Small Engine Service" and "Pirate's Cove," neither of which feature adult entertainment. Said statistics indicated property values over the past seven years have increased at a higher rate around the adult entertainment establishments than around the other establishments.

6. Your affiant further provided to the County Board statistics of police calls for King's (featuring adult entertainment), Sugar Daddy's (featuring adult entertainment), Rumor's Bar (no adult entertainment), and the Conoco gas station (no adult entertainment).

7. In so doing, your affiant pointed out the following:

a. Rumor's Bar had nine police calls within the past year.

b. King's Inn, with approximately double the size and seating capacity of Rumor's, had twelve police calls during the same period.

c. Sugar Daddy's had twenty-eight during that period.

d. The Conoco station had thirty-two police calls during that period.

8. In addition, it should be pointed out that neither

King's nor Sugar Daddy's has had any police calls for any drug offenses, prostitution, or sex offenses.

9. By contrast, there were three controlled substance investigations at the Conoco station.

10. The data which your affiant presented to the Benton County Board of Commissioners was uncontradicted by any witness.

11. Your affiant attempted to obtain a tape recording of the hearing so it could be immediately transcribed, your affiant was advised that a tape would not be available for another two weeks.

12. Your affiant did obtain all written submissions by any other witnesses at the public hearing, and those are attached hereto as Exhibits C, D , and E.

13. None of the Benton County Board of Commissioners bothered to read any of the material which your affiant submitted to them.

14. At the conclusion of the testimony, Commissioner Duane Walters moved to continue the hearing two weeks to enable the Board of Commissioners to review the written materials which had been submitted to them. His motion died for lack of the second.

15. The Board of Commissioners then proceeded to enact the ordinance in question.

16. As part of my testimony, your affiant pointed out to the Board of Commissioners that the plain language of the ordinance outlaws your affiant and his wife from engaging in normal marital activities in any hotel room located in Benton County. The Board of Commissioners apparently did not care.

_____
Mark Van Gelder

Subscribed and sworn to before me
this_____day of July, 2001

_____
Notary Public

A-83

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

SOB, Inc., a Minnesota corporation, d/b/a "Sugar Daddy's"; Amy Chenoweth; Shannon Wiborg; Kathryn Haskins; Mark Van Gelder; and Mary Clifford Van Gelder,

Plaintiffs,

AFFIDAVIT OF RANDALL D.B. TIGUE

vs.

County of Benton,

Defendant.

Court File No.01-CV-1239(DDA/RLE

STATE OF MINNESOTA)
)SS
COUNTY OF HENNEPIN)

Randall D.B. Tigue, being first duly sworn on oath, hereby deposes and says the following:

1. Your affiant is the attorney for Plaintiffs in the above-entitled matter.

2. Your affiant was also the attorney for Plaintiffs in the matter of *Kismet Investors, Inc. v. County of Benton*, 617 N.W. 2d 85 (Minn. App. 2000), pet. for rev. denied (Minn. Nov. 15, 2000), pet. for cert. pending, which involved a challenge to the constitutionality of the Benton County Adult Entertainment Zoning Ordinance enacted in 1994.

3. A copy of Benton County's Adult Entertainment Zoning Ordinance, enacted in 1994, and the subject of the *Kismet Investors* litigation, is attached hereto as Exhibit A.

4. The second "whereas" clause of the Benton County zoning ordinance sets forth in detail the studies of alleged "secondary effects" relied upon by the Benton County Board of Commissioners in enacting its 1994 zoning

ordinance.

5. An examination of Defendant's own submissions and justification of the ordinance in question indicates that the County of Benton relied upon the identical studies in enacting its public nudity ordinance in 2001. The only studies purportedly relied upon by the County of Benton in enacting its public indecency ordinance, not relied upon in enacting the zoning ordinance were the following:

a. "Regulation of adult entertainment establishment in St. Croix County," by the St. Croix County Planning Department, dated September 9, 1993, attached hereto as Exhibit B.

b. A report on the secondary effects on the concentration of adult use

establishments in the Times Square area, dated April, 1994, prepared by the Times Square Business Improvement District, a copy of which is attached hereto as Exhibit C.

c. The adult entertainment study of the Planning Department of the City of New York, a copy of which is attached hereto as Exhibit D.

d. The 1978 study by the division of the St. Paul Planning and Economic Development.

6. Your affiant is also the co-author of an amicus curiae brief being submitted to the United States Supreme Court contemporaneously with the submissions in the instant case. The amicus curiae brief was submitted on behalf of the First

Amendment Lawyers Association in *City of Los Angeles v. Alameda Books, Inc.*, U.S. Supreme Court Docket No. 00-799, reviewing *Alameda Books v. City of Los Angeles*, 222 F. 3d 719 (9th Cir. 2000).

7. Attached hereto as Exhibits E, F, and G. are the following documents, which were submitted to the United States Supreme Court as an appendix to said amicus curie brief:

a. A paper prepared by Daniel Linz and Bryant Paul on the applicability of the 1997 Los Angeles secondary effects study, attached as Exhibit E.

b. Excerpts of the April, 1978 St. Paul study, one of the documents allegedly relied upon by the County of Benton in 2001, not relied upon in 1994, attached

hereto as Exhibit F.

c. The undated letter of David Bugher, Community Development Director for the City of Lakewood, Washington, to the Lakewood city attorney, disclosed in discovery in the matter of *Clark v. City of Lakewood*, ___F. 3d____, 2001 W.L. 877062 (9th Cir. August 6, 2001), attached hereto as Exhibit G.

8. Given the emphasis placed by opposing counsel on language from United States Supreme Court asserting that municipalities should be free to "experiment" with solutions to the problem of adverse secondary effects, your affiant sought a sound, well-accepted definition of the term "experiment." Your affiant located the website of the discovery channel, in which teachers were instructed on the scientific method and the use of experimentation. The discussion is

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attached hereto as Exhibit H.

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Randall D.B. Tigue

Subscribed and sworn to before me
this____day of August, 2001.

_____

Notary Public

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Exhibit E

PAPER ON THE APPLICABILITY OF THE 1977 LOS ANGELES SECONDARY EFFECTS STUDY AS A BASIS TO JUSTIFY THE PRECLUSION OF "MULTIPLE USE" ADULT BUSINESSES, AND AN ANALYSIS OF MORE RECENTLY CONDUCTED "SECONDARY EFFECTS" STUDIES.

BY:
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AND
BRYANT PAUL[**]

PRESENTED IN SUPPORT OF THE AMICUS CURIAE BRIEF OF THE FIRST AMENDMENT LAWYERS ASSOCIATION

INTRODUCTION

In its decision now under review by this Court, the Ninth Circuit ruled that the City of Los Angeles had a substantial governmental interest in reducing neighborhood crimes that were presumably associated with the existence of "adult" businesses. *Alameda Books, Inc. v. City of Los Angeles*, 222 F.3d 719 (9th Circuit 2001), *cert. granted.*

The primary evidence propounded by Los Angeles to establish this concern, and to then justify a subsequent prohibition of "multiple use" adult businesses, was a 1977 study undertaken at the request

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of the City Council by the city's Department of Planning in cooperation with the local police department.

At issue for the Ninth Circuit was the question of whether the latter regulations devised by the City were designed to serve this governmental interest. In the case now before it, the Court will examine just what interests are implicated by the 1977 LA Study, and evaluate whether the Study could factually serve as a basis for enacting the 1983 ordinance amendments that prohibit the establishment of "combination" businesses.

In this paper, we attempt to aid the Court in examining these questions, while also seeking to provide further information to the Court concerning its more general consideration of the "secondary effects" doctrine.

Our analysis consists of the following:

First, we establish that the most frequently cited secondary effects studies, including the 1977 Los Angeles Study, show no objective evidence of a relationship between the existence and/or concentration of adult businesses and negative secondary effects. This raises the question of whether there is an appropriate foundation for enacting, under the justification moniker of "secondary effects," an ever-widening array of regulations directed at "adult" businesses.

Second, we set forth certain scientific, and indeed common sense, criteria that we believe should be used in order to evaluate whether any specific "secondary effects" study can be expected to have sufficient trustworthiness so that its results can be reasonably relied upon as the basis for legislative

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decisions. We offer these requirements as reasonable thresholds that we believe should be transcended when considering allegations of "secondary effects" as a basis for legislation. These thresholds or critical questions that may be asked about a study will permit the Court to distinguish objective and fair assertions of the existence of secondary effects from mere unfounded allegations.

Third, we engage in a critical review of the 1977 "secondary effects" study undertaken at the request of the Los Angeles City Council *in light of these basic requirements* for reasonable reliance on a study's findings.

We attempt to determine: What secondary effects, if any, were found to be associated with "adult" establishments in the City of Los Angeles. Our review of this study finds that in most respects, that study *does not* establish a connection between the existence of an adult business and increases in crime and urban blight and decreases in property values. We find that the study does not even demonstrate the *general* effects of increases in crime or decreases in property values as the result of the concentration of such businesses -- inapposite to the claims of Los Angeles -- much less the *particularized* effects concerning combinations of such businesses at the same location.

We further find that in those few instances where a connection is alleged or implied, the conclusions are predicated upon unscientific and/or flawed methodology so facially apparent that no court should be able to conclude that a legislative body could have reasonably relied upon it as a basis for enacting certain regulations. Because of the lack of true findings in regard to a connection between adult businesses and

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negative secondary effects and the significant methodological flaws found in the 1977 Study, we conclude that there is certainly no sufficient justification for the City of Los Angeles to be able to utilize that Report in order to preclude "multiple use" adult businesses.

Fourth, we synopsize and review for this Court a series of more recently conducted "secondary effects" studies of adult businesses that *do* meet the basic requirements for reasonable reliance. These studies have been undertaken at the behest of not only the business establishments involved, but also by at least one local government seeking justification to regulate adult facilities. They measure the impact of long-existing exotic dance facilities in: 1) Fulton County, Georgia (also reported in *Flanigan's Enterprises, Inc. v. Fulton County*, 242 F.3d 976 (11th Cir. 2001)); 2) Charlotte/Mecklenburg County, North Carolina; and 3) Fort Wayne, Indiana. Unlike the Los Angeles 1977 Study, these investigations are based on sound scientific methodologies and the results obtained therefrom are imbued with sufficient trustworthiness so that they can be relied upon for legislative decision-making.

Having laid this foundation, we then address the City of Los Angeles' contention that the findings of the 1977 Study can be applied to the distinct question of the effects of combination-type business, such as Alameda Books and Highland Books.

Finally, we address the policy implications for the secondary effects doctrine raised by our analyses contained herein.

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ANALYSIS

I. The Ten Most Frequently Cited Secondary Effects Studies, Including the 1977 Los Angeles Study, Show No Objective Evidence of a Relationship Between a Concentration of Adult Businesses and Negative Secondary Effects.

As we established in our Appendix to the First Amendment Lawyers Association *Amicus Brief* submitted to this Court in *City of Erie v. Pap's A.M.*, studies conducted pursuant to sound methodological principles demonstrate no correlation between the presence of certain adult businesses and the existence of surrounding negative secondary effects (such as increases in the incidence of prostitution and violence). *See*, City of Erie v. Pap's A.M., 120 S. Ct. 1382, 1403 n.3 (2000) (Souter, J., dissenting). *See also*, Brief for First Amendment Lawyers Association as *Amicus Curiae*, 16-23, at App. 1-29.

Following submission of our analysis of these oft-utilized secondary effects studies to this Court, we undertook to expand upon that review, which resulted in a paper submitted to the Annual Meeting of the International Communication Association, 2000, which received a "Top Three Refereed Papers in Communication Law and Policy" award following peer-review. That analysis was then subjected to further peer-review and ultimately published as a paper entitled Governmental Regulation of 'Adult' Businesses through Zoning and Anti-Nudity Ordinances; Debunking the Legal Myth of Negative Secondary Effects, *Paul, et al. Communication Law & Policy, Vol. 6, No. 2, Spring, 2001, pp. 355-391.*

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In examining the history of the uses of these studies by municipalities, we found a consistent tendency to incorrectly assume that these studies, as a group, showed evidence of problems attributed to adult facilities. Municipalities tended to inappropriately equate the simple fact that a "study" had been undertaken with positive evidence of a relationship between adult businesses and negative secondary effects in a community. Most municipalities never considered the methodological validity of these studies, nor did they even appear to have critically examined the studies in order to determine their true findings. In fact, two of the ten "studies" most frequently cited by government bodies in regard to regulating adult businesses (Detroit, MI and Beaumont, TX) were not empirical data collection efforts at all, or even testimony from citizens, but merely reports discussing recommendations concerning the regulation of adult uses. *Paul, et al.*, at 386.

According to our previous analyses, the 1977 Los Angeles Study is the third most frequently used study by municipalities as a basis for regulating adult businesses. However, as we have noted, the authors of the 1977 Study themselves actually claimed to find *no* causal relationship between adult businesses and decreases in property values. Further, we identified serious methodological problems associated with the Los Angeles Police Department's investigation of the supposed relationship between adult businesses and certain types of criminal activity. Therefore, we concluded that the 1977 L.A. Study did not offer even the most rudimentary form of scientifically reliable evidence of a relationship between adult uses and any form of negative secondary effect. *Paul, et al.*, at 378-379.

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Contrary to our assertions, however, Los Angeles not only believed that their Study found a relationship between the concentration of adult businesses within the Hollywood section of the city and negative secondary effects, but it now contends that it is reasonable to extend the findings of that Study to the question of the effects of individual combination-type businesses, such as Alameda Books and Highland Books.

Obviously, it is important to address the City's contention that the findings of the 1977 Study can be applied to this new question. We address this in **Part V** of the paper.

However, before doing so, we lay a foundation in **Part II** where we first develop a set of threshold issues that should be evaluated in order to determine whether a "secondary effects study" can be reasonably relied upon as a justification for the enactment of laws and regulations; in **Part III** where we then describe in greater detail and in light of these principles, why the Los Angeles Study contains no scientifically reliable evidence of a relationship between even the *existence* of adult businesses and negative secondary effects in the first place; and in **Part IV** where we contrast that study with more recently conducted investigations which – given the employment of sound methodology – we believe then contain reliable results.

II. The Basic Requirements for Reasonable Reliance on Evidence Obtained From a Study of the Secondary Effects of Adult Businesses.

In our appendix to the *Pap's* amicus brief and as contained in our recently published paper, we analyzed

the most frequently cited secondary effects studies in light of a list of criteria that we believed are critical in order for such evidence to meet the standards of scientific reliability as defined by this Court in *Daubert v. Merrell Dow*, 509 U.S. 579 (1993). *See, e.g., Paul, et al.*, at 355-391.

Of course, we do not contend here that a municipality cannot rely upon a secondary effects study as a basis for legislation unless and until that report has been found to have met the elastic *Daubert* standard. Rather, we provide criteria for a court to utilize in determining whether a municipality can justifiably rely upon such a study as a basis for enacting regulations of adult entertainment establishments, or in the particular words of this Court in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), whether a court can constitutionally conclude that a particular study is "reasonably believed to be relevant to the concerns that the municipality meant to address." *Id.* at 51-52.

Succinctly put, we contend that before a municipality can justifiably or reasonably rely upon a particular study as a basis for enacting restrictions on First Amendment freedoms, that study must have at least a modicum of scientific validity (and therefore reliability), and be shown to be relevant to the proposed legislative enactments. However, as we note below, the procedures used to insure scientific validity and reliability do not differ substantially from plain English principles that we intuitively apply to our everyday decision-making.

We have reviewed in our published paper a list of factors derived from the *Daubert* standards. We note there that a municipality need not necessarily be held to

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each of those criteria when legislating. *Paul, et al,* at 370-371. We do contend, however, that at least two of the *Daubert* factors: 1) design of the study so that an error rate can be calculated; and 2) adherence to professional standards in using techniques or procedures (most of which are designed to aid in the calculation of an error rate), should be found by courts to be procedural prerequisites in order for municipalities to be able to utilize them as a basis for regulating expression. These factors insure "evidentiary reliability."

Without this reliability, there is no basis to determine whether there is a substantial or important governmental interest involved, whether a specific piece of legislation is "necessary" in order to further that interest, or whether it is "reasonable" for a municipality to rely upon such a study as a basis for enacting legislation. *U.S. v. O'Brien*, 391 U.S. 367, 377 (1968); *Renton*, 475 U.S. at 51-52.

In a scientific study, the error rate refers to the probability of accepting a result as true, when it is in fact false. It is an indication of the reliability of a finding. *See, Paul,* at 371, for a technical description of how to calculate such a rate. The results of properly conducted surveys, experiments and quasi-experiments are always couched in terms of an error rate. Professional standards that aid in the calculation of an error rate have been devised by scientists in a particular area of inquiry is, consequently, also necessary in order to insure methodological integrity and thus the validity of a study. *See, Paul, et al.,* at 370-372.

Based upon our investigation of the literature and studies both past and recent, we have identified four

methodological criteria that facilitate adherence to professional standards of inquiry that we believe should be considered before a court could conclude that such a report could be reasonably relied upon in order to justify enactment of a certain regulation.

A study of secondary effects should be examined in order to determine whether they answer or violate the following principles:

(1) "Compared to what?" (2) "Is this just a one-time fluke?" (3) "Is crime measured according to a reliable source?" and "did the government go looking for more crime to justify its legislation?" and (4) "Did the investigators talk only to people who would give them answers they wanted to hear?"

These criteria are neither difficult nor cumbersome to apply, nor are they novel in nature. We apply these standards, in an intuitive fashion, when making routine decisions every day. For example, who among us does not ask, when trying to guess the reliability of a new car we are about to purchase: How does the car we are considering compare to a Ford, or a Toyota? If we owned a car from that manufacturer in the past and it broke down, was that a one-time fluke or is this a consistent pattern with this brand? Are we sure we are not trying to convince ourselves that the car is more reliable than it is because the car is fast and is a convertible? Finally, would we listen only to the car sales person about the reliability of the vehicle or would we seek an objective selection of opinions about the car?

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A. "Compared to what?"

Crime rates have been shown to be associated with a concentration of various groups of individuals and businesses.[1] Other things being equal, there are apt, for example, to be more crimes in a densely populated urban area than an undeveloped track of land where people, and therefore "targets," are few and far between. Accordingly, the question that should be asked is not whether there is *any* history of crime in the areas surrounding an adult business (since virtually all business establishments where the public congregates, adult and non-adult alike, will demonstrate to some degree this "connection"), but rather whether there is *more* crime in areas surrounding adult facilities than other type of business establishments situated in comparable areas. The same is true for property values and economic blight. An adult business may be placed, for example, in a depressed area pursuant to zoning requirements, but that factor, in-and-of-itself, does not establish that the adult facility somehow *caused or exacerbated* urban blight and the decrease of property values.

Accordingly, in order to insure that accurate and fair comparisons are being considered, a control or

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[1] P. A. Engstad. Environmental Opportunities and the Ecology of Crime: Crime in Canadian Society (1975); D. C. Duffala. Convenience stores, armed robber, and physical environmental features. American Behavioral Scientist, 20: 227-246. (1976). Dennis W. Roncek and M. A. Pravatiner. Additional evidence that taverns enhance nearby crime. Sociology and Social Research, 70; 185-188; Richard Block and Carolyn Block. Space, place, and crime: Hot-spot areas and hot places of liquor-related crime. In Crime and Place, edited by J.E. Eck and D. Weisburd. Vol. 4 of Crime prevention studies. Monsey, New York: Criminal Justice Press.

comparison area must be selected that is truly "equivalent" to the area(s) containing the adult entertainment business(es). We have previously elaborated on the factors that may ensure equivalence and the calculation of an error rate in the test of differences between the adult and control areas. *Paul*, at 373.

B. "Is this just a one-time fluke?"

A sufficient period of elapsed time, ideally both prior to and following the establishment of an adult entertainment business, is necessary when compiling data in order to ensure that the study is not merely detecting an erratic or aberrant pattern of social activity. Generally, the longer the time period under study, the more stable and reliable (and more valid) the estimates of secondary effects.

C. "Is crime measured according to a reliable source?" and "did the city or the police go looking for more crime?"

The crime rate in a secondary effects study must be measured according to the same valid source for all areas considered. Although we describe this concern in detail in *Paul*, at 373-374, it is especially important that the measurement of crime be factually valid and reliable, such as a daily log kept by police of calls for service, or a compilation of the number of actual arrests. In addition, researchers should also acknowledge changes in police surveillance techniques once adult entertainment businesses have been established in a particular community, as well as during the period that a secondary effects study is being undertaken. Obviously,

increased surveillance of an area will have an impact on the amount of crime "detected" by the police.

D. "Did the investigators talk only to people who would give them answers they wanted to hear?"

Survey research, if relevant to the question of adverse secondary effects at all, must be properly conducted. Historically, most such inquiries involve asking real estate professionals, local property owners, law enforcement officers, and/or community residents to *opine* as to the effect that the presence of an adult business would have on a particular community. Less frequently, surveys of citizens' perception of crime and victimization are undertaken. While subjective surveys may provide us with a sense of the general *opinion* of a particular group regarding the impact of adult entertainment businesses on surrounding neighborhood property values or criminal activity, they do not provide sound evidence of a relationship between these businesses and the actual impacts on the surrounding areas.

Even if some survey research may be relevant to the issue at hand, it must be properly conducted in order for the researcher to calculate an error rate. Professional standards do exist for performing methodologically valid social scientific survey research so that it possesses some degree of reliability and trustworthiness. Adherence to these standards is essential if researchers hope to obtain legitimate unbiased survey results. We discuss these in *Paul, et al.*, at 374.

III. The 1997 Los Angeles Study Authors Themselves Claim to Have Found No Evidence of a Causal

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Relationship Between Adult Businesses and Decreases in Property Values, and at Best Claim Only an Equivocal Relationship with Crime. More Importantly, this Equivocal Relationship is Based Upon a Flawed Comparison and is Predicated Upon a "Special Policy Study" Undertaken in Order to Ferret Out More Crime. In addition, the Study Does Not Contain the Requisite Attributes to Allow It to be Reasonably Relied Upon.

The 1977 LA Study report is a combination of four separate research endeavors, each of which will be discussed in terms of our threshold questions.

A. The City Planning Department investigating the effects of concentrations of adult businesses on area property values reported that they did *not* find any consistent increase or decrease in property values associated with adult businesses.

In this portion of the Study, the researchers, asking the "compared to what" question, compared changes in property values from 1970-1976 for five "study" areas (those containing concentrations of adult businesses) and four "control" or comparison areas (those containing no such concentrations).

The six-year time span between 1970 and 1976 is significant in that the authors claim it represented a period of substantial increases in the number and concentration of sexually oriented adult businesses in the study areas specifically, as well as throughout the city in general.

The study findings showed little differences between the study and comparison areas.

This lack of difference leads the researchers to state: "On the basis of this comparison, it cannot be concluded that properties containing concentrations of adult entertainment businesses have *directly* influenced the assessed valuations of such properties."[2] It is interesting to note that the authors of the study underlined the word "directly." The authors may have wished their readers to "read between the lines" and conclude that they may have found evidence of an "*indirect*" influence of adult business concentrations on property values. Yet, no such evidence is offered anywhere within the study.

And, while there are procedural problems with this portion of the study many aspects of it actually show *higher* property values in the adult areas than the non-adult control areas (one set showing a 400 percent greater increase). Such findings are directly opposite to the assumption that these studies (and in particular the 1977 LA Study) stand for the proposition that the existence of adult businesses, or at least a concentration thereof, reduce property values and increase urban blight.

Although containing some methodological flaws, this first study represents the strongest (most methodologically sound and therefore most reliable) of the four sections of the report from a scientific perspective. Yet, the results suggest that no such relationship between a concentration of adult uses and secondary effects exists.

B. The second part of the 1977 LA Study claims to have found that *public opinion* is strongly opposed to the operation of adult businesses. Yet, such a

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[2] 1977 LA study at 2 (emphasis in original).

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"study," even if performed correctly, does little more than attempt to gauge subjective opinions. It does not answer the question of whether adult businesses *cause* adverse secondary effects. And, in any event, the public opinion polling undertaken by the City does not meet the professional standards for performing methodologically valid, reliable and trustworthy social scientific survey research.

We will leave it to others -- the lawyers -- to discuss the question of whether public opinion, even if appropriately and accurately measured, can ever serve as the basis of the suppression and/or regulation of speech and expression related activities. However, even if public opinion were to have some relevance to a secondary effects analysis, our review of this portion of the 1977 LA Study leads us to conclude that any results would be of little to no scientific relevance because of the methodologies used.

Two versions of a survey were administered in this part of the study to determine public opinion concerning adult businesses. The first survey was given to residents and property owners who lived and/or worked within 500 feet of any of the five study areas. This survey yielded a return of only 581 of the 3600 questionnaires, or a 16 percent rate. A separate survey was sent to all of the members of the American Institute of Real Estate Appraisers having a Los Angeles address and also to members of the California Association of Realtors whose offices were located in the vicinity of the study areas (retained from the first section of the report). Only 81 of the 400 questionnaires (or 20 percent of those sent out) were returned.

In both cases, the response rates of these surveys fall well below the acceptable professional standards (a

professional rule of thumb is that a response rate of 50 percent is adequate for analysis and reporting; a response rate of 60 percent is good; and, a response rate of 70-75 percent is very good).[3]

Low response rates such as those in the 1977 Los Angeles Study indicate the presence of a high response bias. In other words, the City may have only heard from people who were motivated to complain about the presence of adult businesses and used the questionnaire to voice their opinion.

Compounding the bias even further, a large portion of the residents and property owners who returned questionnaires were given the questionnaires at two town meetings held to discuss the "problem" of adult businesses.[4]

In the end, such a collection of respondents is surely not a randomly chosen sample from the population of people who reside near adult businesses, with each person having an equal chance of being chosen for the study. Without obtaining a random sample of respondents from the community, the study authors cannot calculate an error rate and, as such, the reliability of any of their findings cannot be determined. And, here, the survey appears to have been conducted in a gerrymandered fashion in order to obtain the desired results.

In summary, the researchers (the City Planning Department) failed to adhere to minimum professional standards by failing to conduct the study in accordance with proper survey techniques.

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[3] See Earl Babbie, The Basics of Social Research 240 (1999).
[4] 1977 LA study, at 32 n.4

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Finally, even if the opinion poll had been conducted in a scientifically sound manner, the research reported in this section does not answer the question of whether concentrations of adult businesses *cause* adverse secondary effects.

Survey opinions cannot replace the evidence supplied by objective comparisons of (for example) property values and/or crime statistics compiled within areas containing adult entertainment businesses, with those garnered from areas containing no such businesses.

C. The third section of the report discusses the results from a 1974 "cluster" analysis performed by the City of Los Angeles Community Analysis Bureau (CAB). However, the City's own analysis for the Hollywood area belies the idea that crime is higher near adult businesses. For other geographical areas, study and control area sites were so incomparable on several key population and economic characteristics as to invalidate legitimate crime comparisons.

This section of the report attempts to determine if the presence of adult businesses is related to criminal activity by comparing areas with adult businesses to areas that did not contain such businesses. The CAB's "cluster" analysis entailed grouping each of the City of Los Angeles's 750 census tracts (the smallest geographical area for which information of residents is collected on a regular basis) into a smaller set of 30 "clusters," or combinations of tracts.

To accomplish this "clustering," the CAB examined each census tract on 66 census variables that

they had deemed to be the most accurate descriptors of the tracts. Importantly, five of the variables used by the CAB to group the tracts into clusters were crime variables. These included: the number of assaults per 100 population, robberies per 100 population, burglary per 100 improved parcels, total arrests per 100 population and narcotic arrests per 100 population aged 14 – 44.[5]

The clusters were also grouped by real estate value variables such as approximate median value of owner occupied units and approximate median monthly rent of renter occupied units.

The authors then statistically compared these clusters that encompassed the adult and comparison areas (three adult areas and three control areas were compared in the Hollywood region of Los Angeles and two adult areas in the North Hollywood and Studio City region were compared to one control area in the San Fernando Valley).

It should be noted that at this point something extraordinary was found. The study authors admit that all of the tracts that were included in the Hollywood adult business areas *and* in the control condition areas were, statistically speaking, identical to each other. The importance of this finding cannot be overstated. It establishes that when undertaking precisely the statistical test that would most reliably yield knowledge of whether the Hollywood census tracts containing adult businesses have higher rates of crime than comparable tracts that do not contain adult businesses, no such higher rates were found.

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[5] 1977 LA study, at 44 n.4, 49.

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According to this test, then, performed by the City itself, the adult business areas and control areas were more similar to each other, in terms of crime, than they were to any other region of the city. In other words, despite the concentration of adult businesses operating within the study areas in Hollywood, those areas with adult businesses were actually more similar to the control areas than they were to other areas in the city.[6]

These findings are *exactly contrary* to what would be expected if there was a connection between adult businesses in Hollywood and the adverse secondary effects of increased crime and decreased property values.

The other two adult business areas (North Hollywood and Studio City) and the one remaining comparison area fell across eight separate census tracts that each fell into one of six different clusters. The implication here is that these adult and comparison areas were actually poorly matched. Specifically, the study and control areas were significantly disparate on several key population and economic characteristics that could influence both crime rates and real estate values (irrespective of the presence of an adult facility). Any differences found between them regarding crime rates or property values is more than likely the result of one or more factors normally associated with criminal activity, rather than the presence or absence of adult businesses.

Nonetheless, regardless of these substantial problems in matching study and control areas, or perhaps because of them, no reliable pattern of differences on the crime rate variables could be found

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[6] 1977 LA study, at 45-46 n.4.

between and the areas with concentrations of adult entertainment businesses and those without such concentrations.

For example, the number of assaults per 100 persons in the population was *lower* in the adult business area clusters (.46 and .37)-than the control area clusters (.48). The robbery rate for one of the study area cluster groups (.17) was *equal* to that for the control area clusters (.17), while the other study area cluster groups were found to have a higher robbery rate (.267) than the control. Burglaries per 100 improved parcels were found to be *substantially lower* than the control area clusters (13.50) for one of the adult area cluster groups (10.94) and slightly higher for the other (13.86). Total arrests per 100 persons in the population were found for both of the study area clusters to have an insignificantly higher rate (4.2 & 4.2) than the control area (4.1). Narcotics arrests per 100 persons in the population were found to be *lower* for the North Hollywood study area cluster groups than the San Fernando Valley control clusters (1.6), but higher for the Studio City study cluster groups (2.66).

Taken as a whole, then, we may note that out of the ten comparisons made between the adult and control areas on crime statistics reported for the Studio City and North Hollywood regions (utilizing these ill-matched areas for comparison purposes), four found higher crime rates in control (non-adult) area clusters, one found no differences between study and control area clusters, and five demonstrated higher crime rates in the adult area clusters. These findings provide no evidence of an actual relationship between the concentration of adult entertainment businesses and the negative secondary effect of increased crime.

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The findings in this section represent the results of the most scientifically sound examination of the relationship between concentrations of adult businesses and criminal activity offered in the entire 1977 LA Study. Only in this section of the report does the City attempt to compare criminal activity in areas containing concentrations of adult businesses (study areas) with properly matched comparison areas containing no such concentrations.

Having found, however, no reliable evidence of differences in crime or property value decreases in areas containing adult businesses, the City then turned to a "special" police study of the Hollywood area.

D. The final section of the Los Angeles Study report focuses on the results of a "special" police department study that was intended to compare the occurrence of certain types of criminal activity in the Hollywood area with the rate of such activity throughout the rest of the city. The first problem with this "study" is that the police admit to stepped-up police surveillance in the Hollywood area between 1969 and 1975, but admit there was no such surveillance increase for the rest of the city.

Unlike the other three sections of the report, the study reported on in this section was not undertaken by the City Planning Department, but by the Los Angeles Police Department (LAPD). The basic finding of this portion or the report provides the opinion and "conclusion" that because crime is higher in the Hollywood area than in other portions of Los Angeles, and because Hollywood had a greater concentration of adult businesses than the remainder of the City, that the increased incident's of crime in Hollywood are directly related to the presence of adult entertainment facilities.

A.112

The first and most substantial problem with this study is that LAPD freely admitted that they had stepped-up surveillance efforts in Hollywood in 1975 during the period they were compiling the criminal activity counts that were later compared to earlier 1969 figures. No such increase in surveillance efforts was reported for the Hollywood region in 1969 or for the rest of the city in either 1969 or 1975. Further, the LAPD reported a 31% increase in the combined number of patrol officers and criminal investigators assigned to the Hollywood area compared to an increase of only two thirds that size in the remainder of the city.

It is likely that the greater increase in certain types of criminal activity between 1969 and 1975 was found by the police in the Hollywood region when compared to the rest of the city because there was an increase in the number of officers looking harder for crime in Hollywood.

The incomparable increases in the number of officers and the stepped-up intensity of surveillance efforts in the Hollywood region render any findings from this section of the 1977 Los Angeles study unreliable according to any scientific criteria.

E. The second problem with the "special" police study is that it compares the occurrence of criminal activity in the Hollywood area *generally* with the rate of such activity throughout the remainder of Los Angeles. The authors incorrectly infer that because there may be a difference in crime rates between these two geographic regions, that this proves that adult businesses were the cause of the difference. This inference is a logical error known as the "Ecological Fallacy."

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The City's interpretation of the results from the "special" police study falls prey to a common logical error in reasoning about research findings known as the "Ecological Fallacy." The fallacy is to assume that something learned about a unit in general says something about the individuals making up that unit.

For example, consider a finding that voting precincts (the ecological unit) with larger percentages of women (individuals) voted, on average, for the Republican candidate in an election. Although we may be tempted to do so, we cannot conclude that women in the precinct were more likely than men to have voted for the Republican candidate, since we have only information collected at the level of precinct, not at the level of the individual voter. Perhaps, the women's vote was more or less "split" while the men in each precinct voted overwhelming for the Republican candidate.

Similarly, we cannot assume that a higher crime rate in Hollywood is due to adult businesses unless we collect information that links crime to the adult businesses *per se* rather than only measuring crime in Hollywood generally and then comparing it to the rest of LA.

The City of Los Angeles commits the Ecological Fallacy in its 1977 Study when, upon finding a difference between the crime rates in the Hollywood area and the rest of the city, it assumes -- *out of an almost infinite list of variables* -- that this difference is due specifically to the concentration of adult businesses in Hollywood, when the researchers did not measure the actual impact of such businesses in Hollywood at all. Simply comparing the crime rates in the entire Hollywood area

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(regardless of whether such crime occurred on or near an adult business property) with the remainder of the city as a whole is an invalid method of attempting to determine whether the increase of crime in the Hollywood area is somehow associated with adult establishments.

F. Summary and implications.

We have illustrated above that not only are there significant methodological flaws in the manner in which the four portions of the 1977 Los Angeles Study were conducted, but that, more importantly, there are no true findings contained in that report which could allow any reasonable social scientist to conclude that adult entertainment facilities were somehow connected to increase in crime and decreases in surrounding property values. More importantly, there are no findings in that Study, direct, indirect, or even implied, justifying the necessity for precluding "multiple use" establishments or providing any support whatsoever for the proposition that such a regulation would serve to reduce or ameliorate such secondary effects.

IV. There Are Studies That Pass the Threshold Questions: (1) "Compared to What?" (2) "Is This Just a One-time Fluke?" (3) "Is Crime Measured According to a Reliable Source?" and "Did the Government Go About Looking for More Crime to Justify its Legislation?" (4) "Did the Investigators Talk Only to People Who Would Give Them the Answers They Wanted to Hear?" These Studies Have Found No Evidence of Adverse Secondary Effects for Adult Businesses and Exotic Dance Establishments.

After having analyzed the prior secondary effects studies, and in particular the 1977 Los Angeles Study,

and having made certain statements concerning the proper methodology that should be utilized in any such investigation in order to be confident that there is even a modicum of trustworthiness in the results obtained, we now undertake an analysis of more recently conducted evaluations of the supposed nexus between adult business establishments and perceived adverse secondary effects. Unlike the LA 1977 Study, the studies described below have attempted to adhere to appropriate methodological concerns so as not to violate the fundamental scientific, methodological and common sense principles discussed above.[7]

These studies, some of which were conducted at the behest of adult business owners but others which were commissioned by the applicable governmental unit, fail to establish any relationship between the operation of adult entertainment businesses (at least those in the form of establishments that present live nude, "topless" or "pasties and g-string" dance entertainment) and negative secondary effects; they offer the highest degree of evidentiary reliability of any preexisting secondary effects studies to date; and they certainly lend evidentiary credence to the underlying proposition of this paper--that being that courts should not accept the mere recitation of a supposed "secondary effects study," without specific analysis thereof, in order to justify regulation and in some instances prohibition of speech and expression related activities.

Overwhelmingly, these studies demonstrate that when proper methodology is employed, and the threshold questions transcended, there are no

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[7] Pursuant to instructions of the Clerk of this Court, copies of the materials referenced in this section of this paper have been lodged with the Court.

demonstrable adverse secondary effects of adult entertainment establishments in the form of crime, reduction of property values, and urban blight.

A. The Fulton County Studies.

These studies are reported in *Flanigan's Enterprises, Inc. v. Fulton County*, 242 F.3d 976 (11th Cir. 2001). On June 13, 1997, the Fulton County Police Department completed a study concerning the number of calls for police assistance and the number of types of crimes occurring in the vicinity of twelve drinking establishments; six that featured adult entertainment and six that did not. This study meets the methodological criteria that we discuss in this paper. The study concluded that, for the time period January 1, 1995 through May 31, 1997, there was *no statistical correlation* of an increase in crime at adult entertainment establishments that served alcoholic beverages. Rather, the statistics indicated *greater* instances and calls for service and reported crime at *non*-adult entertainment establishments that served alcoholic beverages.

The methodological features of this investigation conform closely with several of the scientific principles and common sense rules we apply here to determine if a finding can be trusted. First, crime was measured according to a reliable source--the number of calls for police assistance recorded by computer and compiled by the police objectively, on a daily basis. Second, there was no "stepped up police surveillance" that could inflate crime measurements. A comparison was made between crime rates surrounding the adult establishments and crime surrounding comparable business establishments—answering the "compared to

what" question. And, finally, a sufficient time period, 30 months of calls for service, was utilized to avoid capitalizing on a "one-time fluke" in criminal activity.

In addition, an economic impact study was conducted in 1997. Six Fulton County adult entertainment establishments commissioned Land Development Analysts, Inc. to conduct a study of the clubs' economic impact on their surrounding environs. This study sought to identify negative impacts, if any, on the business volumes, rental rates and property values of surrounding properties. The study revealed high occupancies and rental rates in existing buildings, expensive improvements, business expansions, turn-away business volumes and proposed development in the vicinity of the studied adult clubs. The investigation found no detrimental impacts as caused by the adult facilities.

In response, the County Board of Commissioners had the study peer-reviewed. The Board retained its own appraiser to inspect the subject properties and to review the economic impact study. The appraiser hired by the Board certified that the clubs had gathered the appropriate data and drew appropriate conclusions.

B. Charlotte/Mecklenburg County North Carolina Studies.

Two studies, a property value appreciation study and a crime study, were undertaken in 2001 in the Charlotte/Mecklenburg County, North Carolina, area. As with the Fulton County studies, these investigations utilize the scientific principles and common sense rules outlined above.

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The Property Values Study (*See*, "Measuring secondary effects using spatio-temporal estimation of real estate price appreciation," George W. McCarthy and Henry Renski, University of North Carolina at Chapel Hill, 5/24/01) made use of the entire tax appraisal database for Mecklenburg County, which lists all properties and the last two sales prices of the properties (approximately 600,000 properties). The authors only used houses that were sold twice between 1980 and 1999 (approx. 65,000 properties). Methods were used to determine how far the properties were from the 20 adult dance clubs in the county. The authors then compared annual real estate appreciation rates near clubs versus not near clubs in Mecklenburg County.

The findings indicated that examining performance over time, housing near adult establishments appreciated at least as fast or faster in 11 of twenty years.

Using 1980-2000 tax assessment data from Mecklenburg County, North Carolina, the authors estimated annual appreciation rates and evaluated the extent to which appreciation rates are related to the location of adult clubs. The study showed that there was no evidence that negative secondary effects on house price appreciation can be found in two decades of housing transactions in Mecklenburg County. In fact, the authors note that their interpretation may be too conservative:

> "The results of the study are consistent with the empirical results of the oft-cited studies of negative secondary effects discussed above. In almost every study discussed, the secondary effects

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associated with adult establishments are inconclusive. However, this is a rather conservative reading of the results. One might make the argument that there is evidence from the other studies, evidence that is validated in this study, that there are *positive* secondary effects associated with proximity to adult establishments. While the existence of positive secondary effects might seem an absurd claim, an argument might be made that the location of adult establishments is non-random.

The non-randomness might be associated with the same non-randomness that leads to the location of other undesirable activities (for example, junkyards, mobile home parks, other noisy or dirty production activities) to areas with inexpensive properties. Low priced properties might provide higher than average returns, especially as urban sprawl or development limits make the areas more desirable development locations" (pg. 20).

The Charlotte Crime Study (*see*, "Are Adult Dance Clubs Associated with Increases in Crime in Surrounding Areas? A Secondary Crime Effects Study in Charlotte, North Carolina," May 18, 2001, Kenneth C. Land, Jay R. Williams, and Michael E. Ezell, Duke University) tested the hypothesis that the presence of an adult nightclub increases the number of crime incidents reported in localized areas.

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Appropriate methodology was utilized to select suitable control (non-adult nightclub) sites that were comparable (matched) to the study (adult nightclub) sites on key demographic and other variables that are generally regarded as being related to the incidence of crime.

With support from the United States Department of Justice Office of Community Oriented Policing Services, the Charlotte-Mecklenburg Police Department maintains a computerized reported incidents information system for the city of Charlotte and Mecklenburg County, North Carolina, that permits the easy collection of data concerning all crime incidents reported at or near each of the adult nightclubs and control sites for the three years 1998 through 2000. This information served as the basis of the report.

The authors grouped the reported crime incidents into six categories, ordered from the most to the least inclusive as follows: Total crimes; total Uniform Crime Reports Index Crimes; total Uniform Crime Reports Violent Crime Index Crimes (murder, rape, aggravated assault, robbery); total Uniform Crime Reports Property Crime Index Crimes (burglary, larceny-theft, motor vehicle theft, arson); sex crimes; and all other crimes.

The results revealed that with respect to *all six categories* of crime incidents under investigation, the overall mean numbers of crime incidents for all three years combined are *substantially less* in the areas surrounding the adult nightclubs than in the areas surrounding the control (non-adult) sites.

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C. The Fort Wayne Study.

An empirical study of criminal activity surrounding exotic dance nightclubs in Fort Wayne, Indiana, was undertaken in 2000 by the authors.[8]

As with the Charlotte/Mecklenburg and the Fulton County studies, this examination of the supposed adverse effects of so- called "adult" establishments also adheres to the requirements set out by this Court in *Daubert* for the proper conduct of a social scientific inquiry.

A 1000 feet circumference surrounding each of eight exotic dance nightclubs in Fort Wayne was established. Comparison areas were selected in the city and matched to the club areas on the basis of demographic features known to be related to crime and also matched on the basis of commercial property composition.

Information on calls to the police for service (many of which ended in arrest) for the three-year period of 1997-2000, was obtained. Only crimes presumed to be related to exotic dance establishments were included in our examination. These included: 1) Sex crimes (rape, molestation, indecent exposure, sexual battery); 2) aggression related non-sexual

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[8] The Ft. Wayne clubs studied do not operate in a form of what is traditionally considered to be an "adult" entertainment business. The entertainers at these establishments perform wearing "pasties" and "g-strings" consistent with Indiana statute and this Court's decision in Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991). For this reason, while we refer to previous reports and studies as attempting to analyze the relationship of "adverse secondary effects" and "adult" businesses, we generally refer to the studied facilities here either as "nightclubs" or "exotic dance" establishments.

offenses (shootings, fights, non-sexual battery, disturbances); and 3) thefts, burglaries and robberies.

The number of calls to the police and arrests in the areas surrounding the exotic dance nightclubs was then compared to the number of crimes found in the matched comparison areas. The analysis showed little difference, overall, between the total number of calls to the police reported in the areas containing the exotic dance nightclubs and the total number of offenses reported in the comparison areas. For sex crimes (presumed to be especially likely to be related to exotic dance entertainment establishments) such as rape, molestation, indecent exposure and sexual battery, the overall number of crimes was nearly identical in the areas surrounding the exotic dance nightclubs and the comparison areas. The same pattern of similar crime levels in the club and comparison areas held for thefts, burglaries and robberies. However, for aggression-related, nonsexual offenses, the club areas actually had *only one half* as many calls for service as the comparison areas.

We concluded that there was no empirical evidence of the existence of adverse secondary effects, in the form of crime, surrounding exotic dance businesses in Fort Wayne. Any assumption that such effects existed and that this city should regulate such establishments on the basis of such "adverse secondary effects" was therefore, we contended, not substantiated by that study.

In summary, the findings from the Fulton County, Charlotte/Mecklenburg and Fort Wayne investigations, unlike most of the previously cited secondary effects studies (including the Los Angeles 1977 Study) are

empirically reliable because they apply scientific and common sense principles. Our analyses of these studies suggest that when proper methodology is employed, there are few if any adverse secondary effects found as being associated with adult establishments. In fact, these studies suggest, as did the governmentally prepared St. Paul, Minnesota (1978) study (discussed in detail in *Paul, et al.*, at 375, as being the only methodologically sound investigation among the ten most frequently cited studies), that there is more crime and neighborhood deterioration in other areas of the community, especially where alcohol is served in a non-adult entertainment setting -- than in the areas immediately surrounding adult nightclubs.

Now, in light of these observations, we address the immediate question before the Court.

V. Even if the Los Angles 1977 Study Had Found Evidence of Adverse Secondary Effects Generally, Such findings Would Not Provide Any Information as to Whether "Combination" Uses Engender Particularized Problems That Would be Specifically Addressed by a General "Dispersal" Zoning Ordinance. The Question of When Study Findings can be Generalized to Another Time, a Different Place, or Other People is ultimately an Empirical One.

The fundamental question under consideration by this Court is: Assuming that the 1977 LA Study *had* established evidence of the existence of secondary effects associated with the concentration of adult businesses, can that information be utilized to justify a law prohibiting the establishment of "adult" "combined" or "mixed" uses?

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We conclude, as the Ninth Circuit did, that such an extension is unwarranted and that these limited "findings" provide no basis or justification –whether empirical, intuitive or otherwise –for the zoning provisions under review. In scientific terms, the Circuit Court was grappling with the question of when it is appropriate to "generalize" the findings of an empirical investigation to circumstances other than those originally studied.

A. When is it unreasonable to generalize study findings from one situation to another?

In science, "generalizability" is defined as the quality of a research finding which justifies the inference that it represents something more than the specific observations upon which it is based.

As the present case illustrates, generalizing a research finding beyond the specific observations on which it is based can include multiple considerations. Sometimes it is a matter of seeking similarities between the "character' of the original units studied and the new units to which we wish to generalize. Other times, it may be a matter of frequency of presentation of, for example, adult material as in equating the single showing of a film with the harmful effects assumed to occur with businesses devoted to adult fare. *See, e.g., Tollis v. San Bernardino County,* 827 F.2d 1329 (9th Cir. 1987).

More broadly, sometimes generalizability it is a matter of similarity of concepts: If you discover why people commit burglaries, can you generalize that discovery to other crimes as well?[9] Often, it involves the

[9] Earl Babbie, supra, at 215 n.8.

generalization of findings from a sample to a population. We cannot generalize our findings to other populations because we did not take a random sample from the population (we sampled males and we wish to generalize to females, or we sampled older people and we wish to generalize to younger people in the population).

Other times, we cannot generalize because of the methods we employ to study a phenomenon. If we have measured a phenomenon at a certain level, or chosen a certain "unit of analysis," our findings may not apply well to other units we may wish to consider. Here, our example of the Ecological Fallacy from the "special police study" of the 1977 Los Angeles Study above applies. It is logically impossible to conclude anything about the impact of the concentration of adult businesses in Hollywood when measurements of crime have been taken only at the level of the entire community.

B. Whether the results of a study can be generalized to other times, locations, situations or other persons is an empirical question.

As can be seen from these examples, there is no "magic formula" for determining when a study is generalizable. Instead, social scientists, when confronted with important social policy questions, have come to rely on additional empirical investigations when in doubt about a study's general applicability. An additional investigation is often the only way to insure against improperly extrapolating findings. Thus, whether or not one is able to generalize across people, places, or methodologies may ultimately be an empirical question. Sometimes, only an additional study can tell us how far

a specific set of observations, made earlier, may be extended.

C. Los Angeles should have first empirically determined if it's original zoning legislation was effective before implementing another, more restrictive, set of regulations.

The evidence Los Angeles has relied upon here -- the 1977 Study -- contained no empirical evidence that addresses the specific question of whether an individual combination bookstore/arcade produces any of the increased crime the original study (allegedly) found resulting from a concentration of adult businesses. Nor was any analysis undertaken of the effect upon supposed adverse secondary effects by the enactment of the original "dispersal" zoning provisions which were themselves predicated upon the findings of the 1977 Los Angeles Study itself.

If we assume that the dispersal requirement was meant to ameliorate supposed secondary effects associated with adult businesses, we must also then logically assume that following the enactment of those provisions (which clearly pre-dated the "multiple use" regulations at issue here), whatever secondary effects may have existed would have been significantly reduced or abrogated altogether.

The question then remains, and it is clearly an empirical one, of what secondary effects, if any, exist *after* the enactment of a specific regulation meant to address those problems. If we do not ask that question, we invite the never-ending enactment of yet more and more (and ever more onerous) restrictions without ever examining whether there are any problems left to be

addressed following the enactment of a law meant to correct such problems.

Here, mere reference to the 1977 Los Angeles Study tells us nothing objectively about what secondary effects may remain once the dispersal regulations were enacted in an effort to address those problems. In addition, in the absence of *any* empirical evidence – old, new or otherwise -- of the adverse effects associated with these combination adult uses, it is unreasonable, we contend, for any court to permit a governmental unit to infer or conclude that absent additional regulations, a bookstore/arcade combination would have harmful secondary effects.

Here, Ninth Circuit was faced with the question of whether the government may restrict to selected locations, mixed uses adult businesses on the sole basis of the results of the 1977 Los Angeles Study. In our opinion, that court was correct in asserting that it was not reasonable to rely on that study as justification for these restrictions, first, because that study does not objectively demonstrate any clear adverse effects and, second, even if such effects were reliably shown, it is not readily apparent that they may be generalized to the new question about mixed use businesses *after* the enactment of a general dispersal ordinance.

VI. The Policy Implications for the Secondary Effects Doctrine.

As we have shown above, legislative bodies and courts are now confronted with methodologically sound studies that fail to demonstrate a connection between the existence of adult businesses and negative secondary effects. They are also faced with the

submission of the older-type studies, many "conducted" between twenty to thirty years ago which in some circumstances were not "studies" at all, in other circumstances demonstrated either no connection between adult uses and secondary effects or even an *inverse* connection, in many cases dealt with types of businesses that no longer even exist (adult movie theaters), in virtually all circumstances were undertaken *before* the enactment of specific regulations meant to alleviate those perceived problems, and which by-and-large were not undertaken utilizing even the most rudimentary methodological constraints in an effort to insure validity of the results.

Given the state of contradicting empirical evidence that will be faced by legislative bodies and courts in the future, guidelines may be welcomed to establish under what circumstances the assertion of secondary effects may be utilized as a justification for regulations upon speech and expression related activities. We assert that two sets of inquiries (A and B below) should be made when examining purported evidence that is submitted in an effort to justify or challenge the enactment of such a regulation.

A. Any particular study of secondary effects should be examined in order to determine whether it answers the following questions or violate the following principles: (1) "Compared to what?" (2) "Is this just a one-time fluke?" (3) "Is crime measured according to a reliable source?" and "did the government go about looking for more crime to justify its legislation?" and (4) "Did the investigators talk only to people who would give them the answers they wanted to hear?"

While a local legislative body may not be held to these standards, certainly a court may find it useful to ask these questions in order to determine whether purported supporting evidence for a legislative enactment could be reasonably relied upon. In evaluating the vitality, and indeed validity, or purported "evidence," courts may best be served by turning to the standards we have laid out. Such an analysis would allow courts to separate "the wheat from the chaff," and the truth from the "junk science."

B. If there is a question as to whether a study is being applied more broadly than originally intended, or is being utilized to justify successive laws following enactment of regulations meant to address perceived problems noted in the study itself, a new empirical investigation is often warranted.

It should be axiomatic that the fundamental obligation of a court should be to seek the truth. Here, and in future cases, the question must be asked as to whether, at a certain point of time and in a certain set of circumstances (particularly, in light of already-existing regulations), there exists such evidence that can be *reasonably* relied upon establishing that certain types of adult uses engender some forms of secondary effects so as to warrant the enactment of additional laws?

Justice Souter stated in *Pap's* that cities interested in regulating adult activities on the basis of secondary effects should be required to provide germane evidence of a relationship between the expressive activity and secondary effects. 120 S. Ct. 1382 at 1403-04 (Souter, J., concurring in part and dissenting in part). This case and -- in light of the evidence that we have discussed -- cases that will be adjudicated in the

future where the courts will be required pursuant to *Pap's* to evaluate both the "old" and these "new" studies in the secondary effects calculus in order to determine the validity of a particular regulation, well illustrate why this burden should be demanded.

As we have stated, whether findings from a study conducted for one purpose can be applied to another situation is often an empirical question. Common problems occur with generalization to circumstances, people, situations, and time periods other than those originally studied. Unless the question of whether particular findings are empirically relevant to new situations is addressed through scientifically valid empirical research, the secondary effects doctrine will be viewed as a theory not grounded upon an inquiry of truth, but merely as a theoretical (and unsubstantiated) basis to regulate and in some circumstances ban what some may consider to be undesirable expression.

To not undertake additional empirical inquiry is to make it permissible for governments to continue to regulate today on the basis of a study conducted 25 years ago, and undertaken prior to the enactment of other regulations meant to address the perceived problems of secondary effects. In addition, given the nature of some of these previous studies, reliance upon them makes it permissible to regulate on the basis of the opinions of, for example, a group of vocal real estate board members, sampled improperly, whose opinions cannot be extrapolated or generalized to an entire community. Without additional or new empirical investigations, properly conducted, there is nothing to prevent government from using *any* supposed finding from *any* "study" to justify *any* regulation, no matter how

broadly or unreasonably the findings may be extrapolated.

Collection of empirical information is now not overly difficult or expensive. The Fulton County police collected their evidence easily. Such evidence is now at most municipalities' fingertips in the form of calls for service to the police that are routinely computerized and logged. Property value data is in most circumstances easily obtained from real estate databases designed to track these sales for tax purposes. Certainly, there should be nothing feared in regard to investigation as to the true effects that certain adult businesses may have upon specific municipalities, particularly in light of previous (and now long-standing) regulations -- such as zoning dispersal requirements and anti-nudity provisions -- that were enacted with the specific intent to ameliorate such secondary effects.

In *Pap's*, Justice O'Connor and the plurality provided room for challenges, based on the collection of empirical evidence, to assertions made by municipalities regarding a relationship between adverse secondary effects and adult establishments. The plurality noted that the adult business in question in *Pap's* could have challenged the City of Erie's assertion that nudity led to ill effects but did not do so. This leaves room for the introduction of additional secondary effects evidence both in city council hearings and as a basis for court litigation. When courts are faced with these conflicting assertions of secondary effects, they should utilize the tools that we have suggested herein in order to be able to determine truth and reject fiction and innuendo.

Dr. Daniel Linz, Ph.D.
Bryant Paul, MS

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JEFFERSONVILLE, INDIANA

Ordinance 95-OR-35
An Ordinance Establishing Regulations for the Operation of Live Adult Entertainment Businesses

[EXCERPTS]

Whereas, the policy of the State of Indiana is to grant Cities and Towns all the powers that they need for the effective operation of local government as to local affairs. Indiana Code 36-1-3-2;

Whereas, the law of the State of Indiana provides that Cities and Towns have all powers granted it by statute, all other powers necessary or desirable in the conduct of its affairs, even if not granted by statute;

Whereas, the City of Jeffersonville has the power to protect the public health, lives and property of its citizens;

Whereas, in order to protect the public health, lives and property of its citizens, the City of Jeffersonville has the authority to impose licensing fees which are reasonably related to the administrative cost of issuance of the license, inspecting and regulating the operation of live Adult Entertainment Businesses;

Wherefore, in order to regulate the operation of those businesses described herein, it is necessary to assess licensing fees upon both the businesses and the entertainers.

* * *

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F. Live Adult Entertainment: "Live Adult Entertainment" means:

(1) any live performance which the average person, applying contemporary community standards, finds that the dominant theme of the performance, take as a whole, appeals to the basic interest in sex.

(2) any live performance wherein the matter of the performance depicts or describes, in a patently offensive way, sexual conduct.

(3) any live performance, taken as a whole, lacks serious literary, artistic, political, or scientific value.

(4) any live performance wherein the participant appears in a state of "nudity."

(5) any business wherein its employees, sub-contractors, independent contractors, or any individual who performs any service upon the premises who receives a salary, wages, tips, gratuities or other remuneration either from the patrons of the business or from the owner, operator, his assigns, partners, employees or other agent, wherein said employee, sub-contractor, or individual performs said service in a state of "nudity."

G. Live Adult Entertainment Business: "Live Adult Entertainment Business" means any business within

Exhibit F

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NEIGHBORHOOD DETERIORATION and the LOCATION OF ADULT ENTERTAINMENT ESTABLISHMENTS in ST. PAUL

Prepared by the

COMMUNITY CRIME PREVENTION PROJECT
of the
Minnesota Crime Control Planning Board
and the
Division of Planning
DEPARTMENT OF PLANNING AND ECONOMIC DEVELOPMENT
of the
City of St. Paul

April, 1978

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In May of 1977, the Community Crime Prevention project of the Minnesota Crime Control Planning Board released a study which indicated a strong clustering of crimes around on-sale liquor establishments in Minneapolis. Subsequent to the issuing of this report, the city of St. Paul, through the city council and the mayor's office, became concerned about the impact which adult entertainment had on the neighborhoods in which they were located. These mutual interests and experiences of the city of St. Paul and the Community Crime Prevention project combined to produce this report.

NEIGHBORHOOD DETERIORATION and the LOCATION OF ADULT ENTERTAINMENT ESTABLISHMENTS

INTRODUCTION

Bars, X-rated theaters, bookstores, specializing in pornography, massage parlors and other adult entertainment businesses are generally thought to deteriorate the neighborhoods in which they are sited. These establishments are believed, for instance, to attract unsavory outsiders, set bad examples for minors or otherwise lessen the desirability of the affected neighborhoods as places to live.

Despite this widespread concern about the impact of various adult entertainment facilities, little research has been conducted on the effect of these establishments on the neighborhoods in which they are located. A study of the effects of sexually oriented businesses in California found that areas with high concentrations of these establishments generally showed a relative decrease in property values when compared to areas without such establishments.

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However, the study determined that these concentrations of sex-oriented businesses *were not the primary cause* of the lowered property values.[1] A study in Minneapolis of the spatial distribution of crimes around facilities with on-sale liquor licenses showed a distinct pattern of clustering of crimes within one-tenth of a mile of these establishments.[2] However, no studies have been conducted of the overall effect which all adult entertainment establishments (both alcohol-serving and sexually oriented) have on their surrounding neighborhoods. The following study was designed to investigate the effects of a variety of adult entertainment facilities in St. Paul upon the character of the neighborhoods in which they are located.

* * *

ADULT ENTERTAINMENT ESTABLISHMENTS, 1970-1976

A list of all adult entertainment establishments existing in St. Paul during the study period of 1970-1976 was complied by the St. Paul Planning Division. Establishments were classified as either alcohol-serving businesses or as sexual businesses, which included adult bookstores, adult theaters, and saunas. Alcohol-serving establishments were further classified as to whether they had a tavern (live entertainment) license and, if so, whether such entertainment was sexual in nature. This information was verified, with the aid of the city licensing division's records and the city policy

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[1] *Study of Effects on the Concentration of Adult Entertainment Establishments in the City of Los Angeles*, (Los Angeles: City Planning Department) June 1977.

[2] *Crime in Minneapolis: Proposals for Prevention*, (St. Paul, Minn.: Governor's Commission on Crime Prevention and Control, May, 1977).

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department, for the initial and final study time-points, 1970 and 1976.[1]

This classification system results in the following adult entertainment establishment types:

I. Alcohol-serving establishments.
   - A. Alcohol-serving, without live entertainment
   - B. Alcohol-serving, with live entertainment
     1. Nonsexual entertainment
     2. Sexually oriented entertainment

II. Sexually oriented establishments
   - A. Sexual only (adult bookstores, theaters, and saunas)
   - B. Alcohol-serving, with sexually oriented entertainment (same establishments as in B-2 above)

* * *

The number of all adult entertainment establishments (all alcohol-serving and sexually oriented establishments combined) present in neighborhoods in 1970 is significantly related to the neighborhood quality.[1]

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[1] Although the possession of a license for live entertainment was verified for each establishment, it could not be ascertained from the records whether all of these establishments classified as having sexually oriented live entertainment were those known by the city police department to offer exclusively sex-oriented entertainment. Establishments which had lingerie or swim wear luncheon shows, etc., for only brief periods of the study time were not classified as sexually oriented.

[1] Throughout this study, the presence or absence of a relationship is determined by statistical significance. That is, the statement "a relationship was found . . ." indicates that the analysis results were significant at the $p \leq .05$ level; the statement "no relationship was

That is, neighborhoods with higher crime rates and lower median housing values in 1970 tend to have more adult entertainment facilities located in them. Specifically, neighborhood quality in 1970 is related to the number of alcohol-serving establishments. When types of alcohol establishments are studied, neighborhood quality shows a relationship to the presence of establishments without live entertainment licenses, but has only a (statistically) marginal relationship to establishments with live entertainment licenses. No relationship is found between neighborhood deterioration and the number of sexually oriented establishments present in 1970.

A similar pattern of association appears in the 1976 analyses. The number of all adult entertainment establishments (alcohol-serving and sexually oriented combined) in 1976 is significantly related to neighborhood quality. As in 1970, this relationship is seen for the number of alcohol-serving establishments. This relationship between neighborhood quality and liquor-serving establishments in 1976 is present for both entertainment – and nonentertainment – licensed facilities (although the relationship is stronger for the establishments without entertainment licenses). Again, as in 1970, no relationship is found between neighborhood deterioration and the presence of sexually oriented establishments.

In summary, as shown in Table 1, the present of all adult entertainment establishments (alcohol-serving and sexually oriented combined) tends to be associated with greater neighborhood deterioration in both 1970 and 1976. *However, when types of adult entertainment establishments are studied separately, this relationship is*

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found . . ." indicates that the analysis results were *not* significant at the $p \leq .05$ level.

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found only for the alcohol-serving establishments, not for sexually oriented facilities.

* * *

These analyses show the same overall pattern of results as found in Stage I. For both 1970 and 1976, the presence of all adult entertainment establishments (alcohol-serving and sexually oriented combined) is related to neighborhood deterioration. As in Stage I, when adult entertainment establishment types are analyzed separately, the relationship is found only for alcohol-serving establishments. Neighborhood quality/deterioration is significantly related to the total presence of alcohol-serving establishments, and to the presence of establishments without live entertainment licenses. The relationship found between deterioration and entertainment-licensed establishments in Stage I does not persist after zoning and neighborhood age are controlled. As in Stage I, there is no relationship, in either 1970 or 1976, between neighborhood deterioration and the presence of sexually oriented establishments.

In summary, as shown in Table 2, a relationship between neighborhood quality and the number of all adult entertainment establishments (alcohol-serving and sexually oriented combined) located in the neighborhood does persist after introducing controls. This relationship is found for the alcohol-serving adult entertainment facilities studied but not for the sexually oriented establishments. These same patterns of association are present for both 1970 and 1976. *Therefore, the relationship between neighborhood deterioration and the presence of all adult entertainment establishments is more accurately viewed as a relationship between neighborhood deterioration and the presence of all alcohol-serving establishments.*

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* * *

TABLE 2 SUMMARY OF STAGE II: Relationships between Adult Entertainment Establishments and Neighborhood Quality/Deterioration Controlled for Legal/Market Influences[a]		
Type of Adult Entertainment Establishment	1970 Deterioration and 1970 Establishments	1976 Deterioration and 1976 Establishments
All Establishments: (alcohol serving and sexually oriented combined)	Related	Related
ALCOHOL-SERVING: Without entertainment licenses With entertainment licenses	Related Related Not Related	Related Related Not Related
Sexually Oriented	Not Related	Not Related
[a]The presence of relationships is statistically significant, $p < .05$.		

* * *

In conclusion, as shown in Table 3, adult entertainment facilities tend to be established in areas of relative deterioration. A pattern of deterioration appears to follow the locations of certain types of adult entertainment establishments. This could be an increase in the pattern of deterioration *already present. This cycle of "deterioration-adult entertainment-deterioration" is seen only for areas in which there are alcohol-serving establishments.* Sexually oriented establishments, when analyzed by themselves, do not

show this cyclic pattern of relationship with neighborhood deterioration.

* * *

TABLE 3
SUMMARY OF STAGE III:
Relationships between Adult Entertainment Establishments and Neighborhood Quality/Deterioration Controlled for Legal/Market Influences[a]

Type of Adult Entertainment Establishment	1970 Deterioration and 1970 Establishments	1976 Deterioration and 1976 Establishments
All Establishments: (alcohol serving and sexually oriented combined)	Related	Related
ALCOHOL-SERVING:	Related	Related
Without entertainment licenses	Related	Related
With entertainment licenses	Not Related	Not Related
Sexually Oriented	Not Related	Not Related

Although adult entertainment establishments tend to locate in already deteriorated neighborhoods, there is a stronger tendency for deterioration to follow the location of adult entertainment establishments.

[a]The presence of relationships is statistically significant, $p < .05$.

* * *

E. SUMMARY OF FINDINGS

A.142

A summary of the relationships found in Stages I through IV is presented in Table 5.

[Insert Table 5]

STAGE I: *Does deterioration tend to occur in the same areas of the city as adult entertainment businesses are located, in 1970? in 1976?*

The presence of all adult entertainment establishments (alcohol-serving and sexually oriented combined) tends to be associated with greater neighborhood deterioration in both 1970 and 1976. However, when types of adult entertainment establishments are studied separately, this relationship is found only for the alcohol-serving establishments, not for sexually oriented facilities.

STAGE II: *Does the relationship between neighborhood deterioration and adult entertainment persist even when other factors are controlled, in 1970? in 1976?*

A relationship between neighborhood quality and the number of all adult entertainment establishments (alcohol-serving and sexually oriented combined) located in the neighborhood does persist after introducing controls for legal and market influences. This relationship is found for the alcohol-serving adult facilities studied but not for the sexually oriented establishments. These same patterns of association are present for both 1970 and 1976. Therefore, the relationship between neighborhood deterioration and the presence of all adult entertainment facilities is more accurately viewed as a relationship between

neighborhood deterioration and the presence of all alcohol-serving establishments.

STAGE III: *Has deterioration in neighborhoods followed rather than preceded the location of adult entertainment businesses in the affected neighborhoods, during the 1970-1976 time period? That is, do adult entertainment establishments contribute to neighborhood deterioration?*

Adult entertainment facilities tend to be established in areas of relative deterioration. A pattern of deterioration appears to follow the locations of certain types of adult entertainment establishments. This could be an increase in the pattern of deterioration *already present.* This cycle of "deterioration-*adult entertainment*-deterioration" is seen only for areas in which there are alcohol-serving establishments. Sexually oriented establishments do not show this cyclic pattern of relationship with neighborhood deterioration.

STAGE IV: *Is the effect of adult entertainment on neighborhood quality/deterioration a threshold phenomenon? That is, does neighborhood quality show a marked deterioration after a critical number of adult entertainment establishments are located in an area?*

The number of adult entertainment establishments in a neighborhood has a strong threshold effect on associated neighborhood deterioration, for both 1970 and 1976. This means that the increase in deterioration associated with each additional establishment is not constant. The effect of each

Exhibit G

A.144

additional adult entertainment establishment on neighborhood quality depends upon the number of such establishments already present in the area. The addition of an adult entertainment establishment to an area with more than one or two of these establishments already present is associated with a marked increase in neighborhood deterioration. When types of adult entertainment establishments are studied separately, threshold effects are found for the number of alcohol-serving establishments, not for the number of sexually oriented establishments present.

SUMMARY AND IMPLICATIONS FOR PUBLIC POLICY

These is statistically significant relationship between the number of adult entertainment establishments (alcohol-serving and sexually oriented combined) located in an area and the deterioration of that area as reflected in housing values and crime rates. This relationship was found to exist in both 1970 and 1976, even when legal and market influences such as light industrial/commercial zoning and neighborhood age are controlled for.

When types of adult entertainment establishments were studied separately, a significant relationship was found between neighborhood deterioration and the number of alcohol-serving establishments; in the presence of controls for legal and market influences, the number of alcohol-serving establishments without entertainment licenses was found to be most strongly related to neighborhood deterioration.

It should be noted, while the presence of sexually oriented establishments taken by themselves does not

show a significant association with neighborhood deterioration, these establishments tend to locate in areas which already reflect the effects of other adult entertainment establishments, making it difficult without further analysis to ascertain the unique contribution which sexually oriented establishments have on neighborhood deterioration.

A.146

From: David Bugher
To: DHEID
Subject: Adult businesses

Well, I have a depressing statistic. It's good in one way and bad another. Since incorporation, the City has amassed 15,415 reported criminal incidences. Get this, 25% occurred along a 300 acre strip of Pacific Highway and South Tacoma Way. How many incidences were within 1,000 feet of all adult entertainment establishments? 400! A lousy 400! That's only 2.6% of the total! Jack Burns will love this.

What bothers me is that many communities use the secondary effects of adult businesses (i.e. crime) to justify stricter codes. This aspect or element just doesn't seem to be present. Sure, there is a great amount of crime in the area, but it is associated with I-5 and the low income neighborhoods along I-5.

I have tried working this issue from a number of different angles. I have tried to focus on the types of criminal incidences (rape, burglary, vandalism) to see if such a corollary existed. It doesn't. I know this isn't what people want to hear, however, that is what is reported.

Dave

A.147

UNITED STATE COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
Case No. 01-3928

SOB, Inc., a Minnesota corporation, d/b/a "Sugar Daddy's"; Amy Chenoweth; Shannon Wiborg; Kathryn Haskins; Mark Van Gelder; and Mary Clifford Van Gelder,

Appellants/Cross-Appellees,

vs.

County of Benton,

Appellee/Cross-Appellant.

AFFIDAVIT OF RANDALL D.B. TIGUE

STATE OF MINNESOTA)
)SS
COUNTY OF HENNEPIN)

Randall D.B. Tigue, being first duly sworn on oath, hereby deposes and says the following:

1. Your affiant is the attorney for Appellants in the

above-entitled matter.

2. Your affiant has read the panel opinion in this matter, in particular, the assertion contained at p. 15 of the panel opinion as follows:

> "While 'serious artistic merit' is a component of obscenity jurisprudence, [Citation omitted.], the Ordinance is not obscenity-based. The Ordinance's exception applies only to a 'theatrical production performed in a theater by a professional or amateur theatrical or musical company.' Thus, an arresting officer will know to a virtual certainly whether a particular live nude performance at Sugar Daddy's falls within the exception."

3. In point of fact officers enforcing the ordinance have displayed no such knowledge.

4. Attached hereto as Exhibit A and B are certified copies of the criminal complaints against dancers Amy Jo Draeger and Brandy Morcomb, two dancers issued citations on the only occasion which the county attempted to enforce the ordinance.

5. Attached hereto as Exhibit C and D are certified

copies of the not guilty verdicts rendered in jury trials for both of those Defendants.

6. Attached hereto as Exhibit E is a newspaper account, wherein the Benton County attorney publically announced his intention to dismiss the final pending prosecution, after two consecutive juries had determined that the dancers' performances had artistic merit and thus resulted in not guilty verdicts.

7. Your affiant executes this affidavit in support of the attached petition for rehearing.

_____
Randall D.B. Tigue

Subscribed and sworn to before me
this____day of February, 2003

_____
Notary Public

A.190

STATE OF MINNESOTA — IN DISTRICT COURT

COUNTY OF BENTON — SEVENTH JUDICIAL DISTRICT

STATE OF MINNESOTA,

Plaintiff,

vs.

COMPLAINT FOLLOWING CITATION FOR MISDEMEANOR

AMY JO DRAEGER
207 5TH STRET, APT. #2
Buffalo, MN 55313

DOB: 12/28/80

Defendant.

COMPLAINT

The complainant, being dully sworn, makes complaint to the above-named court and states that there is probable cause to believe that the above-named defendant committed the offense described below. Complainant states that the following facts establish probable cause:

Doug Brinkman, complainant, is chief deputy sheriff for Benton County. He bases this complaint upon information contained in the files of the Benton County Sheriff s Department.

On July 3, 2001, the Benton County Board of Commissioners enacted an ordinance prohibiting public indecency and providing a criminal penalty, Ordinance No. 332. Said ordinance became effective immediately upon its passage and publication. This ordinance was published in the Benton County News on July 10, 2001. The Benton County News is the official publication for the county of Benton.

On July 11, 2001, at approximately 4:00 p.m., Benton

County Sheriff James J. McMahon, Sr. went to a business known as Sugar Daddy s, an exotic dance club located at 500 66th Street N.W., Watab Township, Benton County, Minnesota. Sheriff McMahon met with a female employee of this club and provided her with a copy of the newly-enacted Benton County Ordinance No. 332. At that time, another female, who stated she was a dancer at this club, appeared and Sheriff McMahon explained to both females that he expected them to abide by the newly-enacted ordinance. Sheriff McMahon was asked by the females what the procedure would be if they did not comply with the ordinance. Sheriff McMahon informed both females that the sheriff s department would issue citations in lieu of physical arrests in these types of misdemeanor cases. Sheriff McMahon advised that as long as the violating persons had proper identification, and did not obstruct the duties of investigating officers, and they did not have warrants for their arrests or continued to violate in the officer s presence, that the violators would be cited and released. The females assured Sheriff McMahon that they would not resist deputies access to the premises and that all dancers would have the proper identification available upon demand from the deputies. Sheriff McMahon then left the premises.

On July 11, 2001, three undercover deputies were assigned to go to Sugar Daddy's, located at the aforementioned address, in plain clothes, to observe the behavior of employees and patrons within the business. The deputies assigned to go in undercover were Benton County Deputy Scott Steinberg and Deputy Neal Jacobson, along with Stearns County Deputy Steve Lehmkubl. These three deputies entered the club at approximately *7:45* p.m. on this date. One of the three deputies was concealing an undercover video camera to record the activity occurring within the club.

Upon entering the business, each deputy paid $10 for the two drink minimum to gain entrance into the business. In exchange for the $10, the two drinks obtained were non-alcoholic. No alcoholic beverages are served at this establishment. The deputies observed a stack of flyers at the corner of the bar which listed four of the five Benton County Commissioners, advising patrons of Sugar Daddy's to call these commissioners and give their view on the indecency ordinance. The three deputies were initially seated approximately 15 feet from the front of the stage. The deputies observed a white female dancer, with the stage name of "Sonia," who was described as being approximately 5'8" in height with shoulder length brown hair. Sonia was wearing a long black robe. Sonia eventually disrobed and was observed by deputies to have no clothing covering her breasts. Sonia then partially removed her g-string item of clothing, displaying her genitalia area to the patrons within the club. After Sonia was finished with her routine, female number two, with the stage name of "Devon," arrived. Devon was approximately 5" 10" in height, had long blonde hair, and had a small tatoo in the middle of her back. While Devon was on stage, she exposed her breasts and exhibited them without any clothing covering them. She also exposed her bare genitalia area to the patrons within the club. The deputies noted that each of the females involved in these activities were on stage for approximately the length of three songs.

After Devon's exhibition, the third female arrived with the stage name of "Tiffany." Tiffany was described as a white female, approximately 5'8" in height, with sandy blonde hair which was put up in a clip. Tiffany also wore glasses while on stage. During Tiffany s routine, she exposed her bare breasts, along with her bare genitalia area.

After Tiffany was finished, the next female arrived

with the stage name of "Zoey." Zoey was described as being a white female approximately 5 6" in height and was aged approximately 19-22 years with long blonde hair. While on stage, Zoey displayed her bare breasts and exposed her bare genitalia area. Zoey also attempted to lick her breasts during her exhibition.

After Zoey was through, a fifth female appeared on stage with the name of "Marissa." Marissa was a larger, blonde-haired female, with a large tatoo on her back and a small one on her leg. Marissa disrobed and exposed her bare breasts and her bare genitalia areas to the patrons. Marissa also attempted to lick her breast nipples.

While at this club, Deputy Jacobson paid $25 to the bartender in exchange for a "couch dance" which was one song length long. Deputy Jacobson did receive the couch dance from the female who called herself Devon. During the lap dance, Devon and Deputy Jacobson had

a short conversation while Devon performed the couch dance. During the couch dance, Devon removed her top and her g-string items of clothing and exposed her bare breasts and genitalia

- areas to Deputy Jacobson. Prior to the couch dance, Devon inquired of Deputy Jacobson as to whether he would be contacting persons that were attempting to close down Sugar Daddy's due to the new ordinance. Devon stated that she had been working as a bartender at Sugar Daddy's, but was now dancing at the club. During the remainder of the couch dance, Devon did have skin contact with Deputy Jacobson's clothing.

After being in the club for approximately one hour, the three deputies left and went to the Sauk Rapids Police Department. There they met with Sheriff McMahon, Chief Deputy Brinkman and other uniformed deputies. The three deputies advised the others as to the activities which had

occurred within the club. All of them watched the surveillance video in order to compare the females appearances with their stage names.

Sheriff McMahon then went back to the Sugar Daddy s club with Deputies Jerome Kahl, Kyle Dusing, John Cruze, and Keith Boser. The deputies entered into the club to locate and identify the females who had exposed themselves to club patrons.

Deputy Kahl located the female who called herself Zoey. This female was positively identified by her Minnesota driver s license as Angelique Monique Eisinger.

Deputy Dusing located the female who called herself Tiffany. Tiffany was identified by her Minnesota driver s license as being the defendant herein, AMY JO DRAEGER.

Deputy Cinze located the female who called herself Devon. Devon produced identification which showed her correct name to be Anndrea Ellen Miller.

Deputy Boser located the female who called herself Marissa. Deputy Boser received identification which showed her correct name to be Brandy Lee Morcomb.

Deputies found that "Sonia" had left the business. Sonia s true name is currently unknown.

The above facts constitute complainant s basis for believing that on the 11th day of July, 2001, at Sugar Daddy s, 500 66" Street N.W., Watab Township, Benton County, Minnesota, the above-named defendant committed the following described

A.155

offense(s):

Charge: VIOLATION OF PUBLIC INDECENCY ORDINANCE

In violation of: Benton County Ordinance #332
Maximum penalty: 90 days and/or $1000

The defendant, AMY JO DRAEGER, knowingly or intentionally, in a public setting or place, appeared in a state of nudity.

THEREFORE, complainant requests that said defendant, subject to bail or conditions of release where applicable,

(1) be arrested or that other lawful steps be taken to obtain defendant s appearance in court; or

(2) be detained, if already in custody, pending further proceedings, and that said defendant otherwise be dealt with according to law.

Complainant Doug Brinkman

A.156

FINDING OF PROBABLE CAUSE

From the above sworn facts, and any supporting affidavits of supplemental sworn testimony, I, the issuing officer, have determined that probable cause exists to support, subject to bail or conditions of release where applicable, defendant's arrest or other lawful steps to be taken to obtain defendant s appearance in court, or detention, if already in custody, pending further proceedings. The defendant is, therefore, charged with the above-stated offense.

_____

Issuing Officer Signature

A157

STATE OF MINNESOTA IN DISTRICT COURT

COUNTY OF BENTON SEVENTH JUDICIAL DISTRICT

STATE OF MINNESOTA,

Plaintiff,

vs.

COMPLAINT FOLLOWING CITATION FOR MISDEMEANOR

BRANDY LEE MORCOMB
1518 9TH Ave. s. #104
St. Cloud, MN 56301

DOB: 62/10/77

Defendant.

COMPLAINT

The complainant, being dully sworn, makes complaint to the above-named court and states that there is probable cause to believe that the above-named defendant committed the offense described below. Complainant states that the following facts establish probable cause:

Doug Brinkman, complainant, is chief deputy sheriff for Benton County. He bases this complaint upon information contained in the files of the Benton County Sheriff s Department.

On July 3, 2001, the Benton County Board of Commissioners enacted an ordinance prohibiting public indecency and providing a criminal penalty, Ordinance No. 332. Said ordinance became effective immediately upon its passage and publication. This ordinance was published in the Benton County News on July 10, 2001. The Benton County News is the official publication for the county of Benton.

On July 11, 2001, at approximately 4:00 p.m., Benton County Sheriff James 1. McMahon, Sr. went to a business known as Sugar Daddy s, an exotic dance club located at 500 4th Street N.W., Watab Township, Benton County, Minnesota. Sheriff McMahon met with a female employee of this club and provided her with a copy of the newly-enacted Benton County Ordinance No. 332. At that time, another female, who stated she was a dancer at this club, appeared and Sheriff McMahon explained to both females that he expected them to abide by the newly-enacted ordinance. Sheriff McMahon was asked by the females what the procedure would be if they did not comply with the ordinance. Sheriff McMahon informed both females that the sheriff s department would issue citations in lieu of physical arrests in these types of misdemeanor cases. Sheriff McMahon advised that as long as the violating persons had proper identification, and did not obstruct the duties of investigating officers, and they did not have warrants for their arrests or continued to violate in the officer s presence, that the violators would be cited and released. The females assured Sheriff McMahon that they would not resist deputies access to the premises and that all dancers would have the proper identification available upon demand from the deputies. Sheriff McMahon then left the premises.

On July 11, 2001, three undercover deputies were assigned to go to Sugar Daddy's, located at the aforementioned address, in plain clothes, to observe the behavior of employees and patrons within the business. The deputies assigned to go in undercover were Benton County Deputy Scott Steinberg and Deputy Neal Jacobson, along with Stearns County Deputy Steve Lehmkuhl. These three deputies entered the club at approximately 7:45 p.m. on this date. One of the three deputies was concealing an undercover

video camera to record the activity occurring within the club.

Upon entering the business, each deputy paid $10 for the two drink minimum to gain entrance into the business. In exchange for the $10, the two drinks obtained were non-alcoholic. No alcoholic beverages are served at this establishment. The deputies observed a stack of flyers at the corner of the bar which listed four of the five Benton County Commissioners, advising patrons of Sugar Daddy s to call these commissioners and give their view on the indecency ordinance. The three deputies were initially seated approximately 15 feet from the front of the stage. The deputies observed a white female dancer, with the stage name of "Sonia," who was described as being approximately *5'8"* in height with shoulder length brown hair. Sonia was wearing a long black robe. Sonia eventually disrobed and was observed by deputies to have no clothing covering her breasts. Sonia then partially removed her g-string item of clothing, displaying her genitalia area to the patrons within the club. After Sonia was finished with her routine, female number two, with the stage name of "Devon," arrived. Devon was approximately 5'10" in height, had long blonde hair, and had a small tatoo in the middle of her back. While Devon was on stage, she exposed her breasts and exhibited them without any clothing covering them. She also exposed her bare genitalia area to the patrons within the club. The deputies noted that each of the females involved in these activities were on stage. for approximately the length of three songs.

After Devon s exhibition, the third female arrived with the stage name of "Tiffany." Tiffany was described as a white female, approximately 5'8" in height, with sandy blonde hair which was put up in a clip. Tiffany also wore glasses while on stage. During Tiffany s routine, she exposed her bare breasts, along with her bare genitalia area.

After Tiffany was finished, the next female arrived with the stage name of "Zoey." Zoey was described as being a white female approximately 5 6" in height and was aged approximately 19-22 years with long blonde hair. While on stage, Zoey displayed her bare breasts and exposed her bare genitalia area. Zoey also attempted to lick her breasts during her exhibition.

After Zoey was through, a fifth female appeared on stage with the name of "Marissa." Marissa was a larger, blonde-haired female, with a large tatoo on her back and a small one on her leg. Marissa disrobed and exposed her bare breasts and her bare genitalia areas to the patrons. Marissa also attempted to lick her breast nipples.

While at this club, Deputy Jacobson paid *$25* to the bartender in exchange for a "couch dance" which was one song length long. Deputy Jacobson did receive the couch dance from the female who called herself Devon. During the lap dance, Devon and Deputy Jacobson had a short conversation while Devon performed the couch dance. During the couch dance, Devon removed her top and her g-string items of clothing and exposed her bare breasts and genitalia areas to Deputy Jacobson. Prior to the couch dance, Devon inquired of Deputy Jacobson as to whether he would be contacting persons that were attempting to close down Sugar Daddy s due to the new ordinance. Devon stated that she had been working as a bartender at Sugar Daddy s, but was now dancing at the club. During the remainder of the couch dance, Devon did have skin contact with Deputy Jacobson s clothing.

After being in the club for approximately one hour, the three deputies left and went to the Sauk Rapids Police Department. There they met with Sheriff McMahon, Chief Deputy Brinlcman and other uniformed deputies. The three deputies advised the others as to the activities which had

occurred within the club. All of them watched the surveillance video in order to compare the females appearances with their stage names.

Sheriff McMahon then went back to the Sugar Daddy s club with Deputies Jerome Kahl, Kyle Dusing, John Cruze, and Keith Boser. The deputies entered into the club to locate and identify the females who had exposed themselves to club patrons.

Deputy Kalil located the female who called herself Zoey. This female was positively identified by her Minnesota driver s license as Angelique Monique Eisinger.

Deputy Dusing located the female who called herself Tiffany. Tiffany was identified by her Minnesota driver s license as being Amy Jo Draeger.

Deputy Cruze located the female who called herself Devon. Devon produced identification which showed her correct name to be Anndrea Ellen Miller.

Deputy Boser located the female who called herself Marissa. Deputy Boser received identification which showed her correct name to be that of the defendant herein, BRANDY LEE MORCOMB.

Deputies found that "Sonia" had left the business. Sonia s true name is currently unknown.

The above facts constitute complainant s basis for believing that on the 11th day of July, 2001, at Sugar Daddy's, 500 66th Street N.W., Watab Township, Benton County, Minnesota, the above-named defendant committed the following described offense(s):

Charge: VIOLATION OF PUBLIC INDECENCY

A.162

ORDINANCE

In violation of: Benton County Ordinance #332
Maximum penalty: 90 days and/or $1000

The defendant, BRANDY LEE MORCOMIB, knowingly or intentionally, in a public setting or place, appeared in a state of nudity.
applicable,

THEREFORE, complainant requests that said defendant, subject to bail or conditions of release where

(1) be arrested or that other lawful steps be taken to obtain defendant s appearance in court; or

(2) be detained, if already in custody, pending further proceedings, and that said defendant otherwise be dealt with according to law.

_____

Complainant **Doug** Brinkman

A.163

FINDING OF PROBABLE CAUSE

From the above sworn facts, and any supporting affidavits of supplemental sworn testimony, I, the issuing officer, have determined that probable cause exists to support, subject to bail or conditions of release where applicable, defendant's arrest or other lawful steps to be taken to obtain defendant's appearance in court, or detention, if already in custody, pending further proceedings. The defendant is, therefore, charged with the above-stated offense.

_____

Issuing Officer Signature

A.164

STATE OF MINNESOTA
COUNTY OF BENTON
IN DISTRICT COURT
SEVENTH JUDICIAL DISTRICT

State of Minnesota

Plaintiff,

vs.

Court File: TX-O1-2147

Brandy Lee Morcomb,

Defendant

We, the **Jury, find** the defendant not guilty of the charge of:

Public Indecency, in violation of Benton County Ordinance 332.

_____

Foreman/Forewoman

A.165

STATE OF MINNESOTA
COUNTY OF BENTON
IN DISTRICT COURT
SEVENTH JUDICIAL DISTRICT

State of Minnesota

Plaintiff,

vs.

Court File: T2-O1-2143

Amy Jo Draeger,

Defendant

We, the Jury, find the defendant not guilty of the charge of:

Public Indecency, in violation of Benton County Ordinance 332.

_____
Foreman/Forewoman

A.166

•St. Cloud Times Online

Benton won't try case of 4th dancer

David Urzze
Staff Writer

FOLEY - The curtain has fallen on the prosecution of nude dancers in Benton County, for now.

County Attorney Robert Raupp said Wednesday that he is dropping indecency charges against a Sugar Daddys dancer, a day after another dancer was found not guilty of the same charges. Brandy Morcomb was found innocent Tuesday of violating the county s anti-nudity ordinance.

She is the second dancer to be found not guilty of those charges. Four dancers at the Sank Rapids club were cited this summer by sheriffs deputies. One previously pleaded guilty, and then Morcomb and another were acquitted of the charges. Monique Eisinger was the fourth dancer awaiting trial.

"I think the evidence (against Eisinger) is similar in nature to the cases that we had tried here," Raupp said. "We ve had two juries say that their conduct had artistic merit and we respect their judgment. Any further prosecution under the indecency ordinance would be unlikely."

Raupp stopped short of declaring an end to prosecutions of nude dancers. He also declined to discuss what advice he might give to the county board about rescinding the ordinance.

"I'm not going to rule out enforcement of the ordinance in the future. It will be assessed on a case-by-case basis," Raupp said. "I sincerely doubt the county board would repeal this ordinance given what s happened."

Raupp disagreed with defense attorney Randall Tigue's assessment that the board pandered to a vocal minority when passing the controversial anti-nudity ordinance. Of the 35 prospective jurors questioned during the two trials, only five said they d close the club if they had the absolute legal authority to do so, Tigue said.

Raupp pointed to the lengthy deliberation in the second trial - eight hours, compared to the 75 minutes needed to acquit the first dancer of the misdemeanor charge.

The jurors took their obligation seriously and thoroughly considered their action," Raupp said. "I think it shows that, despite what others say, it wasn't that cut and dry."

The decision to drop the charge against Eisinger was based largely on the evidence against her, Raupp said.

The undercover videotape shows only about five seconds of Eisinger dancing clothed. Videotapes shown to the two juries that acquitted the dancers contained only a small portion of each dancer's performance.

In the first trial, jurors said they hadn't seen enough of the dancer s performance to make a judgment about whether the performance had an artistic merit.

The county ordinance contains an exception that allows nudity in a performance that has "serious artistic merit."

Raupp didn't have a breakdown of the costs to prosecute the first two dancers, he said.

"The cost obviously is something you can't ignore given our county's budgetary situation right now," he said. "But when you're talking about prosecution of a criminal offense, I think it s an oversimplification to put it in terms of costs versus a financial benefit."

If that were the case, Raupp said, speeding tickets and zoning enforcement would disappear because the financia! penalty rarely outweighs the cost of investigation and prosecution.

"In this case, from my perspective, the main consideration was whether you could prove the case or not," Raupp said.

(2)

SUPREME COURT, U.S.
FILED
JUL 9 2003
OFFICE OF THE CLERK

No. 02-1764

IN THE

Supreme Court of the United States

SOB, INC., A MINNESOTA CORPORATION, d/b/a SUGAR DADDY'S; AMY CHENOWETH; SHANNON WIBORG; KATHRYN HASKINS; MARK VAN GELDER; and MARY CLIFFORD VAN GELDER,

Petitioners,

v.

COUNTY OF BENTON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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39 pp

QUESTIONS PRESENTED

1. Whether the Eighth Circuit's decision upholding the Benton County Ordinance prohibiting public nudity is consistent with this Court's rulings in *City of Los Angeles v. Alameda Books* and *City of Erie v. Pap's A.M.*?

2. Whether the Eighth Circuit's decision refusing to enjoin the County from enforcing the public nudity ordinance by means of custodial arrest is consistent with this Court's rulings in *Lee Art Theater v. Virginia* and *Roaden v. Kentucky*?

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CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED

The First Amendment to the United States Constitution and the Benton County Public Indecency Ordinance No. 332. *See* Pet. at 1-2; Resp't App. at 1a-5a.[1]

STATEMENT OF THE CASE AND THE FACTS

On June 5, 2001, at a regular meeting of the Benton County Board of Commissioners (hereinafter "Board"), the County Attorney for Benton County, Robert Raupp, presented a draft public nudity ordinance. Appellants' App. at A645-A646. The County Attorney referred to the U.S. Supreme Court case which upheld a public nudity ordinance (*City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000)) and the City of Cannon Falls public nudity ordinance which had been upheld by a Minnesota court. *Id.*

County Attorney Raupp presented a comprehensive report to the Board in May, because, as noted therein, Board members had asked him about other methods besides the county zoning ordinance for addressing potential adverse secondary effects

1. The draft public nudity ordinance included in Petitioner's App. at A51-A54 is not a copy of the Benton County Public Nudity Ordinance as it was enacted. A copy of the Ordinance is included in Respondent's App. at 1a-5a. Citations in the form "Resp't App." are to the appendix to Respondent's brief. Citations to "Pet." are to Petitioners' petition. Citations in the form "Appellants' App." are to the Appendix to the Brief of Appellants (now Petitioners) submitted to the Eighth Circuit. Citations in the form "Appellee's App." are to the Appendix to the Brief of Appellee (now Respondent) submitted to the Eighth Circuit. Respondent will provide the Court with copies of the materials cited herein (or any other parts of the record below) should the Court so request.

associated with adult uses. *Id.* at A653-A663. The Board was clearly advised that they might consider evidence of adverse secondary effects obtained either through their own local experience, or through studies conducted by other communities. *Id.*

Prior to the July 3, 2001 Board meeting, the Commissioners had before them studies from a number of communities, as well as the Minnesota Attorney General's study on the regulation of sexually oriented businesses. *Id.* at A641, A665-1021a, A1023; Appellee's App. at A4-A220.[2] Those studies indicate a vast array of potentially adverse secondary effects arising from the existence of sexually oriented businesses. For example, the Minnesota Attorney General's report concluded there was compelling evidence that sexually oriented businesses can lead to high crime rates, depression of property values, and a change in the character of a neighborhood. Appellants' App. at A1002. The report noted arrest rates underestimate the level of crime associated with such businesses because, due to the nature of such crimes and the individuals involved, many are never reported to the police. *Id.* at A1005. Similarly, the 1987 St. Paul study found the welfare of the community could be greatly affected, as the sexually oriented businesses can lead to a feeling in neighboring areas that such areas are "unsafe and undesirable" as well as frequent sex related harassment by motorists and pedestrians, and litter of a sexual nature. Appellee's App. at A26-A30. These effects lead to negative perceptions about a

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2. The Appellants' Appendix did not contain all of the studies that the Board relied upon in enacting the Ordinance. Thus, the County included the remainder of the studies that it relied upon in its Appendix. *See* Appellee's App. at A4-A220. All of the studies were included in Defendant's Exhibit 3 which was submitted to the District Court with Defendant's Memorandum of Law in Opposition to Plaintiffs' Motion for a Temporary Restraining Order.

neighborhood or community with resulting effects on the quality of life. *Id.* at A30. Dead zones can be created due to sexually oriented business where people avoid going into them. *Id.* at A170. The studies noted adult use signage as a potential problem, not the least of which can be the exposure of minors. *Id.* at A110, A-179.

A public hearing was held on the proposed public nudity ordinance on July 3, 2001. Appellants' App. at A1022-A1034. A number of citizens spoke both in favor of and against the Ordinance. *Id.* at A1023-A1028. Numerous concerns were expressed regarding the effects of sexually oriented businesses on the community, including the harm these businesses may cause to children, as well as adults. *Id.* Citizens also submitted materials in advance of the Board meeting expressing their concerns, including a report by a private investigator, which indicated that upon visits to Petitioners' establishment, he observed dancers rub their breasts against the top of customers' heads, dancers rubbing the crotches of male patrons, and dancers rubbing their bodies (including their crotches, buttocks, and heads), up and down along the crotches of male patrons. Appellee's App. at A221-A229. Testimony of a former manager of various strip clubs was also presented, which details some of the crimes, abuse, drug usage, and other activities that go on in sexually oriented businesses. *Id.* at A230-A239.

The manager of Sugar Daddy's, Mr. Van Gelder, spoke against the Ordinance at the hearing. Appellants' App. at A1023-A1025. He contended there was no increase in crime as a result of his establishment. *Id.* at A1024. He provided to the Board a study seeking to debunk other studies that have concluded sexually oriented businesses cause negative secondary effects. *Id.* He also alleged property values had not been negatively affected in the areas surrounding sexually oriented businesses. *Id.* at A113, A1025 and Appellee's App. at A290-A292.

At the July 3, 2001 meeting, County Attorney Raupp indicated the draft ordinance contained proposed language relating to secondary effects for the Board's consideration. *Id.* He indicated the Board could adopt the proposed findings if it felt the findings were appropriate and reflected the Board's opinions. *Id.*

After considering the evidence, the Board voted to adopt Benton County Ordinance No. 332 (hereinafter "Ordinance") that prohibits public indecency and provides a misdemeanor penalty for public nudity. Resp't App. at 1a-5a. Section 2 of the Ordinance indicates that the Board finds public indecency can increase the incidents of criminal activity, including but not limited to prostitution, disorderly conduct and sexual assault; public indecency can expose children to an unhealthy and nurtureless environment; public indecency can present health concerns; and public indecency can have a potentially negative impact on the value and marketability of property. *Id.* at 1a-2a.

On July 6, 2001, Plaintiffs filed a Motion for a Temporary Injunction asserting the Ordinance was unconstitutional and asking the District Court to enjoin the County from enforcing the Ordinance. Appellants' App. at A20. The District Court denied Plaintiffs' motion. *Id.* at A1138.

On September 11, 2001, a combined hearing was held on Plaintiffs' application for a permanent injunction and a trial on the merits. Pet. at A29. The District Court ruled the Ordinance did not violate the First and Fourteenth Amendments and the Ordinance was not unconstitutionally overbroad. *Id.* at A40-A41. The court, however, ruled Plaintiffs were entitled to an injunction forbidding enforcement of the Ordinance by means of custodial arrest because such enforcement constituted an unlawful prior restraint of protected expression. *Id.* at A43-A45. Plaintiffs

appealed the District Court's decision upholding the Ordinance to the Eighth Circuit Court of Appeals. Appellants' App. at A1151. The County cross-appealed, arguing the District Court's Findings Nos. 9 and 10 were clearly erroneous and asserting the District Court erred by enjoining the County from enforcing the Ordinance by means of custodial arrest.

On January 24, 2003, the Eighth Circuit affirmed the District Court's decision that the ban on live nude dancing is constitutional. Pet. at A17. The Eighth Circuit reversed the District Court's decision that enjoined the County from enforcing the Ordinance by means of custodial arrest and ordered the District Court to vacate that injunction. *Id.* at A27.

REASONS FOR DENYING THE PETITION

1. THE EIGHTH CIRCUIT'S DECISION UPHOLDING THE VALIDITY OF THE PUBLIC NUDITY ORDINANCE IS CONSISTENT WITH THIS COURT'S DECISIONS IN *ALAMEDA BOOKS* AND *PAP'S*.

Petitioners assert the refusal of the Eighth Circuit to employ the burden-shifting standard adopted by the plurality opinion in *City of Los Angeles v. Alameda Books*, 475 U.S. 41 (2002) creates a conflict with the relevant decisions of this Court. The particular language that Petitioners rely on in the *Alameda Books* case provides as follows:

> The municipality's evidence must fairly support the municipality's rationale for its ordinance. If plaintiff fails to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the

> municipality meets the standard set forth in *Renton*. If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance.

Alameda Books, 475 U.S. at 438-39. Petitioners assert they casted doubt on the County's rationale for the Ordinance, and thus, the Ordinance is not justified.

Petitioners have failed to point out that the *Alameda Books* case involved a zoning regulation whereas the *Pap's* case involved a public nudity ordinance. As the Eighth Circuit explained "zoning restrictions typically impact a broad range of adult entertainment businesses, whereas a ban on live nude dancing imposes a *de minimus* restriction on expressive conduct, while otherwise 'leaving the quantity and accessibility of speech substantially intact.'" Pet. at A15 (quoting *Alameda Books*, 122 S. Ct. at 1742 (Kennedy, J. concurring)). As the Eighth Circuit concluded in this case, no language in the *Alameda Books* case suggests the Court is changing the deference afforded to local municipalities in enacting public nudity ordinances. Pet. at A17. Nonetheless, it is clear the Eighth Circuit did not ignore the burden-shifting analysis in *Alameda Books* that Petitioners continue to stress. Rather, the Eighth Circuit concluded Petitioners failed to cast sufficient doubt on the County's rationale for the Ordinance, and thus, the burden did not shift back to the County. *Id.* ("Sugar Daddy's failed to cast sufficient doubt on the County's rationale for the Ordinance.") A review of the information submitted by Petitioners demonstrates that the Eighth Circuit's decision that Petitioners did not cast sufficient doubt on the County's rationale for the Ordinance is consistent with this Court's opinions.

Petitioners assert that by introducing two papers written by Paul, Linz, and Shafer, they "casted serious doubts" as to the validity of the studies relied upon by the County for its conclusion that adult entertainment businesses cause adverse secondary effects. Pet. at 13. One of those papers was also introduced in the *Pap's* case. In the *Pap's* case, this Court specifically stated it did not view the Paul, Linz, and Shafer article as sufficient to cast doubt on the city's rationale for the public nudity ordinance. *Pap's*, 529 U.S. at 298 (stating the study relied on by *amicus curiae* did not cast any legitimate doubt on the Erie city council's judgment about Erie) (citing Brief for First Amendment Lawyers Association as *Amicus Curiae* 16-23) and at 300 (rejecting Justice Souter's position that the Court should ignore the city's actual experience and instead require an empirical analysis).[3]

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3. As Petitioners assert, an updated version of the Paul, Linz, and Shafer paper was submitted in the *Alameda Books* case. Clearly, the introduction of that updated paper also did not change this Court's conclusion that adult entertainment businesses cause adverse secondary effects. Other courts have similarly rejected such evidence as sufficient to rebut a municipality's conclusion regarding adverse secondary effects. *See, e.g., Nite Moves Entertainment v. City of Boise*, 153 F. Supp. 2d 1198, 1208 (D. Idaho 2001) (rejecting Dr. Linz's testimony as to adequacy and reasonableness of studies regarding adverse secondary effects, where reliance on those studies was found reasonable by Supreme Court in *Pap's*); *R.V.S. v. City of Rockford*, __ F. Supp. 2d __, Civil File No. 03-C-50048, 2003 WL 21354607 at *6 (N.D. Ill. 2003) (explaining that Dr. Linz's testimony was insufficient to cast doubt on experience of local government); *Kismet Investors v. County of Benton*, 617 N.W.2d 85, 94 (Minn. App. 2000) (explaining that issue of whether adult uses actually cause secondary effects is type of fact-finding best left to county's comparatively superior ability to amass and evaluate vast amount of data available and make predictive judgments about its own circumstances), *pet. for cert. denied*, 536 U.S. 904 (June 10, 2002).

Petitioners also assert they casted doubt on the County's rationale for the Ordinance by introducing evidence showing in the eight years of their existence, the two adult entertainment facilities in the County "have generated no more police calls or complaints of criminal activity than have other commercial establishments within the County, such as Rumor's Bar or the Conoco gas station." Pet. at 5. Although Petitioners claim to have submitted evidence from the past eight years (*id.* at 14), the evidence was limited to a one-year period. *See id.* at A80.

It is important to note Petitioners did not conduct a local study to determine the effect adult entertainment businesses have had on local crime rates. Rather, Petitioners selectively chose two local businesses and compared the police calls to those businesses with the police calls to the two adult entertainment businesses. Mr. Van Gelder's Affidavit regarding crime statistics is clearly self-serving.[4]

Petitioners' assertion that the two adult entertainment facilities "have generated no more police calls or complaints of criminal activity" than have Rumor's Bar is incorrect. Sugar Daddy's had three times more police calls than Rumor's Bar in the one-year period and only four less calls than the Conoco gas station. Pet. at A80. Contrary to Petitioners' assertion, no evidence was submitted regarding "complaints of criminal activity." Rather, Mr. Van Gelder's Affidavit is limited to police calls and does not provide any type of description as to why the police were called or the results of those calls.

Mr. Van Gelder's Affidavit does not cast legitimate doubt on the County's conclusion that adult entertainment businesses cause adverse secondary effects. Rather, the Affidavit supports

4. Petitioners did not even introduce the crime statistics they provided to the Board to the District Court.

the County's rationale for the Ordinance. The information submitted by Mr. Van Gelder shows that criminal activity is associated with Sugar Daddy's. Pet. at A80. Simply because Mr. Van Gelder was able to find one local business having four more police calls than Sugar Daddy's in a one-year period does not cast any legitimate doubt on the evidence before the County that adult entertainment businesses cause adverse secondary effects.[5]

Finally, Petitioners point to Mr. Van Gelder's analysis of property values as the last piece of evidence that they assert casted doubt on the County's rationale for the Ordinance. Petitioners' property analysis consisted of comparing property values for the area surrounding the two adult entertainment businesses in the County with the property values for the areas surrounding "D.J.'s Small Engine Service" and "Pirate's Cove." Pet. at A79. Petitioners assert the statistics indicated property values over the past seven years have increased at a higher rate around the adult entertainment establishments than around the other establishments. *Id.*

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5. Several other courts have rejected similar arguments made by other adult entertainment businesses. *See Jake's Ltd. v. City of Coates*, 284 F.3d 884 (8th Cir. 2002), *pet. for cert. denied*, 123 S. Ct. 413 (2002) (rejecting plaintiffs' argument that police activity due to sexually oriented businesses was on par with that of local bar that did not have nude dancing and thus city's crime statistics did not support regulating adult entertainment business on basis of secondary effects); *World Wide Video of Washington v. City of Spokane*, 227 F. Supp. 2d 1143 (E.D. Wash. 2002) (upholding constitutionality of zoning ordinances regulating adult retail use establishments and concluding that such businesses had not casted direct doubt on city's rationale for ordinances, where land use planner's empirical study focused on blight, crime, and property values and did not tell entire story about adverse secondary effects of adult establishments).

Again, Petitioners did not conduct a local study regarding the effects the adult entertainment businesses have had on local property values. Rather, they selectively chose the properties with which to compare the properties surrounding the adult entertainment businesses.

The Affidavit of the County Assessor, Brian Koester, however, shows the figures produced by Mr. Van Gelder are misleading and do not establish anything regarding the effect a certain type of business may have on nearby property values. Resp't App. at 6a-10a. The County Assessor explained the materials submitted by Mr. Van Gelder were not prepared by the County Assessor's Office. *Id.* at 7a, ¶ 3. The County Assessor found numerous errors in the information submitted by Mr. Van Gelder. *Id.* ¶ 4. For example, the County Assessor noted that all of the percentage market increases in Mr. Van Gelder's submissions were not calculated pursuant to generally accepted valuation methods, and thus were incorrect and inflated. *Id.* In addition, the County Assessor explained that estimated market value and taxable market value numbers had been mixed together in Petitioners' submissions or used alternatively, which resulted in a higher inflationary factor than was correct and thus incorrect percentage market increases. *Id.* at 7a-8a, ¶ 4.

The County Assessor also explained that Mr. Van Gelder did not take into account improvements of the properties, such as unimproved properties that then had new homes built on them, which resulted in an incorrect percentage market increase. *Id.* at 8a, ¶ 5. The County Assessor also noted that Mr. Van Gelder compared lakefront properties with some off-water properties which was not an accurate comparison. *Id.* The County Assessor stated many of the entries in Petitioners' submissions

did not reflect any recent sales and the recent sales that were reflected showed an incorrect percentage increase in value. *Id.* at 8a, ¶ 6.[6]

The County Assessor noted property values could be negatively affected by other nearby situated properties in at least two ways. *Id.* ¶ 7. First, there could be an actual decrease in property values. *Id.* at 8a-9a, ¶ 7. Second, there could be an increase in value that is less than that of a comparable property not situated next to the property in question. *Id.* at 9a, ¶ 7. The County Assessor explained that to determine whether property values are negatively affected by other nearby situated properties, one would look to what are termed comparative sales, which Mr. Van Gelder's submissions did not do. *Id.*

The County Assessor also explained that whether an activity that takes place at one property negatively affects property value of other properties may take a significant amount of time before the negative effects become apparent. *Id.* ¶ 8. Negative effects may not show at all during an active market, instead not becoming apparent until the real estate market has been inactive for some time. *Id.* The County currently, and has for some time, had an extremely active real estate market. *Id.* ¶ 9.

The information Mr. Van Gelder submitted to the Board is clearly self-serving. As discussed above, the County Assessor, who is clearly more qualified in this area than Mr. Van Gelder, pointed out numerous ways in which Mr. Van Gelder's submissions were misleading and inaccurate. *Id.* at 6a-10a.

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6. For example, in regard to parcel .01432 (which was incorrectly noted as parcel .01432.06 in Mr. Van Gelder's submissions), the Assessor's records showed the property sold in April, 2000, and the percentage increase over eight-years time was actually only 30.19% instead of the 130.91% as indicated on Petitioners' submissions. Resp't App. at 8a, ¶ 6.

In addition, the County's finding regarding property values provided public indecency "can have a potentially negative impact on the value *and marketability* of property." *Id.* at 2a (emphasis added). Mr. Van Gelder's Affidavit is only related to estimated property values and does not address the marketability of properties near the adult entertainment businesses. For all of the reasons discussed above, the evidence submitted by Petitioners does not cast doubt on the County's finding that one of the adverse secondary effects caused by adult entertainment businesses is their negative effect on the value and marketability of nearby properties.

As the Eighth Circuit correctly pointed out, Petitioners' submissions only addressed police calls and property values, whereas the findings of the Ordinance also provide public indecency can expose children to an unhealthy and nurtureless environment and can present health concerns. *Id.* Petitioners have not submitted any information that would rebut the County's findings that adult entertainment businesses cause these adverse secondary effects. The County's findings are supported by the numerous studies relied on by the County. Appellants' App. at A641, A665-1021a, A1023; Appellee's App. at A4-A220.

The County Board considered approximately seventeen reports that concluded adult entertainment businesses cause adverse secondary effects. *Id.* Many of those reports included case studies from a number of communities. *Id.* On the other hand, the County had the self-serving affidavit of the manager of Sugar Daddy's that asserted Sugar Daddy's had less police calls than one other business and local adult entertainment businesses did not adversely affect property values. If all that were required for sexually oriented businesses to defeat public nudity ordinances was for the businesses to find one business with more police calls than the adult entertainment businesses and to complete a

misleading analysis of property values, then most likely every sexually orientated business would be successful at defeating public nudity ordinances. Clearly, this result is not what the Supreme Court envisioned by stating if plaintiffs cast direct doubt on the municipality's rationale for the ordinance, then the burden shifts back to the municipality. *Alameda Books*, 475 U.S. at 438-39.[7] This Court has repeatedly reasoned that the governing body of the municipality is in the better position than the courts to gather and evaluate information on local problems. *Id.* at 440; *Pap's*, 529 U.S. at 297-98.

In *Pap's*, this Court upheld a public nudity ordinance, where the city did not offer any evidence of secondary effects within the city, and there was no evidence the city council considered studies of secondary effects in any other jurisdiction. 529 U.S. at 297. Rather, the plurality in the *Pap's* case ruled that the city council could take legislative notice of the secondary effects noted in court opinions and could rely upon the own opinions of council members. *Id.* at 297-301.

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7. Petitioners also assert that the Eighth Circuit's decision is directly contrary to the decision in *Flanigan's Enterprises v. Fulton County*, 242 F.3d 976 (11th Cir. 2001), *pet. for cert. denied*, 536 U.S. 904 (2002). Petitioners assert that the *Flanigan's* decision holds that where local evidence plainly indicated a complete absence of adverse secondary effects, it was impermissible for the county to rely on virtually the same dubious foreign studies relied upon by the County in this case. Pet. at 14 n.4. The *Flanigan's* case, however, involved an ordinance which banned nude dancing in establishments licensed to sell liquor, rather than a public nudity ordinance. The *Flanigan's* court stated "*[t]o be sure, Defendants may respond by enacting a ban on all public nudity; the Supreme Court has upheld that.*" *Id.* at 987 (emphasis added). Thus, it appears that the *Flanigan's* court would have decided the issue differently if the ordinance was a public nudity ordinance. The Eighth Circuit's decision is not directly contrary to the *Flanigan's* decision.

Unlike the *Pap's* case, in this case, the County considered numerous studies that concluded adult entertainment businesses cause adverse secondary effects. In addition, the County considered materials submitted by citizens in advance of the Board meeting expressing their concerns, including a report by a private investigator, which indicated upon visits to Petitioners' establishment, he observed dancers rub their breasts against the top of customers' heads, dancers rubbing the crotches of male patrons, and dancers rubbing their bodies (including their crotches, buttocks, and heads), up and down along the crotches of male patrons. Appellee's App. at A221-A229. Testimony of a former manager of various strip clubs was also presented, which details some of the crimes, abuse, drug usage, and other activities that go on in sexually oriented businesses. *Id.* at A230-A239. It is clear that the record before the County Board in this case provided more support for the public nudity ordinance than the record presented to this Court in *Pap's*.

For all of the reasons discussed above, the Eighth Circuit's upholding of the Ordinance was entirely consistent with this Court's holdings in the *Pap's* and *Alameda* cases, and thus, this Court should deny the petition for writ of certiorari.

2. THE EIGHTH CIRCUIT'S DECISION ON THE PRIOR RESTRAINT ISSUE IS NOT IN CONFLICT WITH THIS COURT'S DECISIONS.

Petitioners assert *if* a dancer is arrested for violating the Ordinance, the arrest will be an unlawful prior restraint on speech. The Eighth Circuit properly pointed out that typically, a federal court will not enjoin enforcement of a state criminal law, even though unconstitutional. Pet. at A24. The court explained "'[t]o justify such interference there must be exceptional circumstances and a clear showing that an injunction is necessary

in order to afford adequate protection of constitutional rights.'" *Id.* (quoting *Wooley v. Maynard*, 430 U.S. 705, 712 (1977)). As the Eighth Circuit concluded, Petitioners have failed to demonstrate that exceptional circumstances exist in this case that warrant pre-enforcement intrusion by a federal court of equity. Pet. at A24. The Eighth Circuit correctly concluded any prior restraint issues that may arise should the County elect to enforce the Ordinance by means of custodial arrest were better left for the state courts to resolve on a specific factual record. *Id.* at A27.

Petitioners have asserted the Eighth Circuit's decision is directly contrary to this Court's decisions on prior restraint. In support of that assertion, Petitioners cite two cases, *Lee Art Theatre v. Virginia*, 392 U.S. 636 (1968) and *Roaden v. Kentucky*, 413 U.S. 496 (1973). Both of those cases are easily distinguishable. First, both of those cases involved seizures of films based on obscenity statutes, rather than arrests based on public nudity ordinances. Second, both of those cases involved seizures related to suppressing speech.

In the *Lee Art Theatre* case, a justice of the peace issued a search warrant to seize an allegedly obscene movie based solely on a police officer's affidavit that referred only to the title of the movies and stated the officer had determined from personal observation of the movies and from the billboard in front of the theatre that the movies were obscene. 392 U.S. at 636. The Court explained it had previously ruled that in connection with the seizure of allegedly obscene books, a warrant "issued on the strength of the conclusory assertions of a single police officer, without any scrutiny by the judge of any materials considered * * * obscene" was an unconstitutional seizure. *Id.* at 637 (quoting *Marcus v. Search Warrants of Property at 104 East Tenth St.*, 367 U.S. 717, 731-32 (1961)). The Court

reasoned the procedure under which the warrant was issued fell short of constitutional requirements because there was no inquiry by the justice of the peace into the factual basis for the officer's conclusions. *Id.*

In the *Roaden* case, the issue was whether the seizure of an allegedly obscene film, contemporaneous with and as an incident to an arrest for the public exhibition of the film, could be accomplished without a warrant. 413 U.S. at 497. The Court held such a seizure was an unconstitutional prior restraint. *Id.* at 504. The Court explained that seizing a film that was being shown to the general public presented essentially the same restraint as seizure of books and that such action without a constitutionally sufficient warrant was a prior restraint. *Id.* The Court emphasized the warrantless seizure of books and films constituted a prior restraint because the basis for the seizure was the ideas that the books and films contained. *Id.*

Petitioners assert the custodial arrest of a nude dancer for violation of the Ordinance would function in exactly the same way a warrantless seizure of a film does: the seizure would effectively restrain the dancer's continued right of expression. Pet. at 18-19. Unlike a film, however, which if seized can no longer be shown, Petitioners do not suggest that the arrest of a dancer would be followed by extended custody. Thus, as the Eighth Circuit recognized and Petitioners do not contest, the only later performances likely to be restrained are additional live nude dances that night.

In addition, unlike the *Lee Art Theatre* and *Roaden* cases where the seizures were aimed at suppressing speech, a custodial arrest based on the Ordinance would not be not aimed at suppressing the erotic speech of the dancer. Rather, the arrest of a dancer would be based on the dancer's violation of a criminal

ordinance. The arrest would not be aimed at suppressing any ideas contained in the dance; rather, the action would be aimed at illegal conduct. As this Court has stated, requiring dancers to wear pasties and G-strings does not deprive the dancer of whatever erotic message it conveys. *Pap's*, 529 U.S. at 294.

The Eighth Circuit reasoned that the doctrine of prior restraint is only marginally involved here. Prior restraint is used to describe "orders forbidding certain communications when issued in advance of the time that such communications are to occur." *Alexander v. United States*, 509 U.S. 544, 550 (1993) (quotations omitted). A custodial arrest of a dancer after the dancer's performance would not forbid the dancer from engaging in expressive activities in the future nor would the arrest require her to obtain prior approval for any expressive activities. Rather, an arrest would be for past conduct that violates a criminal ordinance, not for any claimed future conduct. Petitioners have failed to recognize this distinction. *See id.* (explaining that adult entertainment business that argued that forfeiture of assets constituted prior restraint was stretching term "prior restraint" well beyond limits established by Supreme Court cases); *Alexis, Inc. v. Pinellas County*, 194 F. Supp. 2d 1336 (M.D. Fla. 2002) (officers' actions in arresting dancers at adult entertainment businesses for whom there was probable cause for arrest was not impermissible prior restraint); *Kew v. Senter*, 416 F. Supp. 1101, 1106 (N.D. Tex. 1976) (concluding that arrest of dancer after she performed was not prior restraint because dancer could post bail and "resume her 'expression' as quickly as logistics permit").

Petitioners have also completely ignored the cases most directly on point in regard to the custodial arrest issue. In *Furfaro v. City of Seattle*, 27 P.3d 1160 (Wash. 2001), *pet. for cert. denied*, 536 U.S. 922 (2002), exotic dancers and the owner of

an adult entertainment business sued the City of Seattle, arguing the warrantless arrests of the dancers under a city ordinance prohibiting stage dancers from sexual self-touching during a performance were a prior restraint. 27 P.3d at 1162-63. The court disagreed holding warrantless arrests of the nude dancers were not prior restraints. *Id.* at 1166.

The court reasoned live performances were not entitled to the same protection under the First Amendment as that afforded to books and film. *Id.* at 1166. The court, relying on the *Pap's* decision, explained that nude dancing only receives minimal protection under the First Amendment. *Id.* The court reasoned such a minimal level of protection was insufficient to support the contention that a warrant was required by the First and Fourth Amendments even though no federal or Washington state court had recognized such a requirement. *Id.*

In the *Furfaro* case, both parties petitioned this Court for a writ of certiorari. This Court denied both petitions on June 17, 2002. 536 U.S. 922. Similarly, this Court should deny Petitioners' petition because the Eighth Circuit's decision is not in conflict with this Court's decisions.

The aspect of the Eighth Circuit's ruling with which Petitioners take great exception is the Eighth Circuit's comment that "an arresting officer will know to a virtual certainty whether a particular live nude performance at Sugar Daddy's falls within the artistic exception." Pet. at A27. Petitioners, relying on materials that are not part of the record, assert that two dancers who were charged with violating the Ordinance were found not guilty by juries based on the artistic exception. Thus, Petitioners assert the County must be enjoined from enforcing the Ordinance by means of custodial arrest.

First, the materials upon which Petitioners rely for the assertion that two juries returned not guilty verdicts based on the artistic exception should not be considered by this Court. Those materials include criminal complaints against two dancers, copies of two not guilty verdicts, and a newspaper article. *See* Pet. at A147-A168. Those materials were not considered by the Eighth Circuit when the court issued its decision in this matter. Petitioners assert that this Court can take judicial notice of proceedings in other courts. *Id.* at 21 n.6. The court documents, however, do not provide the rationale for the juries' decision. *Id.* at A164-A165. Rather, Petitioners rely on a newspaper article for the assertion that the juries returned verdicts of not guilty based on the artistic exception. Unlike court proceedings, courts do not take judicial notice of statements made in newspaper articles. Thus, this Court should reject Petitioners' arguments based on documents that were never considered by the Eighth Circuit.

Even assuming those documents were properly before this Court, however, Petitioners' argument misses the point. Simply because two juries have determined reasonable doubt existed as to whether the dancers violated the Ordinance does not indicate the officer lacked enough objective information to issue a citation for a violation of the Ordinance. Petitioners fail to acknowledge the difference between the standard for citing someone for violating the Ordinance and the standard that applies for a conviction under the Ordinance.

Since the Eighth Circuit's decision on the prior restraint issue is not in conflict with this Court's decisions, this Court should deny the petition.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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APPENDIX A — ORDINANCE NO. 332

Benton County, Minnesota
Ordinance No. 332

AN ORDINANCE PROHIBITING PUBLIC INDECENCY AND PROVIDING A CRIMINAL PENALTY

THE COUNTY BOARD OF BENTON COUNTY ORDAINS:

Section 1. Purpose. The purpose of this ordinance is to prohibit public indecency in order to deter criminal activity, to promote societal order and public health, and to protect children.

Section 2. Findings. The Benton County Board of Commissioners makes the following findings regarding the need to prohibit public indecency:

A. Public indecency can increase the incidence of criminal activity, including but not limited to prostitution, disorderly conduct and sexual assault.

B. Public indecency can expose children to an unhealthy and nurtureless environment.

C. Public indecency can present health concerns in places of public accommodation and other public settings.

D. Public indecency can have a potentially negative impact on the value and marketability of property.

Section 3. Definitions. The following words and terms when used in this ordinance shall have the following meanings, unless the context clearly indicates otherwise:

A. "Nudity" means:

(1) The appearance of a human bare buttock, anus, male genitals, female genitals, female breast; or,

(2) A state of dress which fails to opaquely cover a human buttock, anus, male genitals, female genitals, or areola of the female breast.

B. "Person" means a natural person twelve (12) years of age or older, including employees or agents of a public accommodation.

C. "Public place" means any location frequented by the public, or where the public is present or likely to be present, or where a person may reasonably be expected to be observed by members of the public. Public places include, but are not limited to, streets, sidewalks, parks, beaches, business and commercial

establishments (whether for profit or not for profit and whether open to the public at large or where entrance is limited by a cover charge or membership requirement), bottle clubs, hotels, motels, restaurants, night clubs, country clubs, cabarets and meeting facilities utilized by any religious, social, fraternal or similar organizations. Premises used solely as a private residence, whether permanent or temporary in nature, shall not be deemed a public place. A public place shall not include enclosed single sex public restrooms, enclosed single sex motel rooms and hotel rooms designed and intended for sleeping accommodations, doctor's offices, portions of hospital and similar places in which nudity or exposure is necessarily and customarily expected outside of the home and the sphere of privacy constitutionally protected therein; nor shall, it include a person appearing in a state of nudity in a modeling class operated by (1) a proprietary school licensed by the state; a college or university supported entirely or partly by taxation; or (2) a private college or university which maintains and operates educational programs in which credits are transferable to a college, junior college or university supported entirely or partly by taxation or an accredited private college.

Appendix A

Section 4. Public Indecency Prohibited. A person who knowingly or intentionally in a public setting or place:

A. appears in a state of nudity;

B. fondles the genitals of himself or herself, or

C. fondles the genitals of another person;

commits public indecency and is guilty of a misdemeanor under Minnesota law and upon conviction thereof, shall be punished by a fine of up to $1,000 or by imprisonment for up to 90 days; or both.

Section 5. Exclusion. The provisions of Section 4.A of this ordinance shall not apply to:

A. any theatrical production performed in a theater, by a professional or amateur theatrical or musical company, which has serious artistic merit; or,

B. a woman breastfeeding a child.

Section 6. Severability. If any section, sentence, or clause or phrase of this ordinance is for any reason held to be invalid, such decision shall not affect the validity of the remaining portions of this ordinance. The County Board hereby declares that it would have adopted the section, sentence, clause, or phrase of this ordinance irrespective of the fact that any one or more sections, sentences, clauses or phrases be declared invalid.

Appendix A

Section 7. Application. Section 4 of the ordinance shall apply to any and all unincorporated areas of Benton County.

Section 8. Effective Date. This ordinance shall be effective immediately upon its passage and publication.

ADOPTED this 3rd day of July, 2001, by the Benton County Board of Commissioners.

By: s/ Duane Grandy
Chair
Benton County Board of Commissioners

ATTEST:

s/ [illegible]
Clerk

APPENDIX B — AFFIDAVIT OF BRIAN KOESTER DATED JULY 13, 2001

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Court File No. 01-CV-1239 (DDA/RLE)

SOB, Inc., a Minnesota corporation,
d/b/a "Sugar Daddy's"; Amy Chenoweth; Shannon Wiborg,
Kathryn Haskins; Mark Van Gelder;
and Mary Clifford Van Gelder,

Plaintiffs,

v.

County of Benton,

Defendant.

AFFIDAVIT OF BRIAN KOESTER

STATE OF MINNESOTA)
) ss.
COUNTY OF BENTON)

Brian Koester, being first duly sworn on oath, states and alleges as follows:

1. That I am Brian Koester, the Benton County Assessor. I have held that position for four years, and am licensed by the State of Minnesota as a Senior Accredited Minnesota Assessor. Prior to becoming the assessor for Benton County,

Appendix B

I was, since 1989, an appraiser in the Morrison County Assessor's office. I make this affidavit based upon personal knowledge.

2. As the assessor for the County of Benton, it is the responsibility of myself and my staff to keep track of all sales of property within the County. Consistent with Minnesota law, the County Assessor's office must establish estimated market value for each tax property, which relates to the taxable value for property tax purposes.

3. Attached to the materials submitted by Benton County in opposition to Plaintiffs' motion as Exhibit 11 is a true and correct copy of a three-page document which Mr. Mark Van Gelder presented at the Benton County Board of Commissioners' meeting held on July 3, 2001. This document was not prepared by the Benton County Assessor's office. I have examined the document, and at this time, can make the following comments.

4. I found a number of errors in the information set forth in Exhibit 11. All of the percentage market increases that are set forth in the document have not been calculated pursuant to generally accepted valuation methods, and thus are incorrect and inflated. In addition, all property tax parcels have two values attributed to them, estimated market value and taxable market value. Taxable market value is limited by Minnesota law to a certain percentage increase over the previous year's valuation. Based on many of the entries that I have examined at this time on Exhibit 11, estimated market value and taxable market value numbers have been mixed

together or used alternatively, which results in a higher inflationary factor than is correct. That results in incorrect percentage market increases.

5. In addition, many of the properties that are listed on Exhibit 11, during the time frame involved, were unimproved properties that then had new homes built on them. Not taking the improvement into account results in an incorrect percentage market increase. Some of the plats are lakefront properties. Some are not. Those properties would not be comparable to one another, as water-frontage properties generally have a stronger market for sale than off-water properties.

6. Many of the entries on Exhibit 11 do not reflect any recent sales. In addition, my examination of Exhibit 11 shows that where properties listed have recently sold, the percentage increase in value is, as noted earlier, incorrect. An example would be parcel .01432 (incorrectly noted as parcel .01432.06), at the address of 9435 Bay View Court. The records of the assessor show that that property sold in April, 2000, and that the percentage increase over eight-years time is actually only 30.19% instead of the 130.91% indicated on Exhibit 11.

7. Based upon my examination of Exhibit 11, and my knowledge of the real estate market within Benton County, as well as my skill, experience and training as an assessor, it is my opinion that Exhibit 11 does not establish anything regarding the effect that a certain type of business may have on nearby property values. Property values could be negatively affected by other nearby situated properties in at least two ways. First, there could be an actual decrease

in property values. Second, there could be an increase in value that is less than that of a comparable property not situated next to the property in question. My examination of Exhibit 11 shows that it is not a comparison of such comparative properties. One would look to what are termed comparative sales, which Exhibit 11 does not do.

8. Whether an activity that takes place at one property negatively affects property value of other properties may take a significant amount of time before it becomes apparent. Generally, this would depend upon how active the market is. If the number of buyers outweighs the number of sellers, the market is active, and any negative effect would take longer to show. Negative effects may not show at all during an active market, instead not developing until the real estate market has been inactive for some time.

9. Benton County currently, and has for some time, had an extremely active real estate market. Currently, Benton County is in the eighth year of an increasing and active market, reflective of the growth of the County. The last two years have had the greatest increase. Generally, there have been approximately 600 to 700 transfers a year during this active market. The year 2000 had 1,300 transfers. Similarly, new construction averages have been approximately $28,000,000 to $30,000,000 a year during this active market. For 2000, that average was approximately $56,000,000. All of these factors indicate an extremely active real estate market.

Appendix B

FURTHER YOUR AFFIANT SAYETH NOT.

s/ Brian Koester
Brian Koester

Subscribed and sworn to before me
this 13th day of July, 2001.

s/ Vicki L. Feuling
Notary Public

(3)

Supreme Court, U.S.
FILED
JUL 24 2003
OFFICE OF THE CLERK

NO. 02-1764

IN THE
SUPREME COURT OF THE UNITED STATES

SOB, Inc., a Minnesota corporation, d/b/a Sugar Daddy's; Amy Chenoweth; Shannon Wiborg; Kathryn Haskins; Mark Van Gelder; and Mary Clifford Van Gelder,

Petitioners,

vs.

County of Benton,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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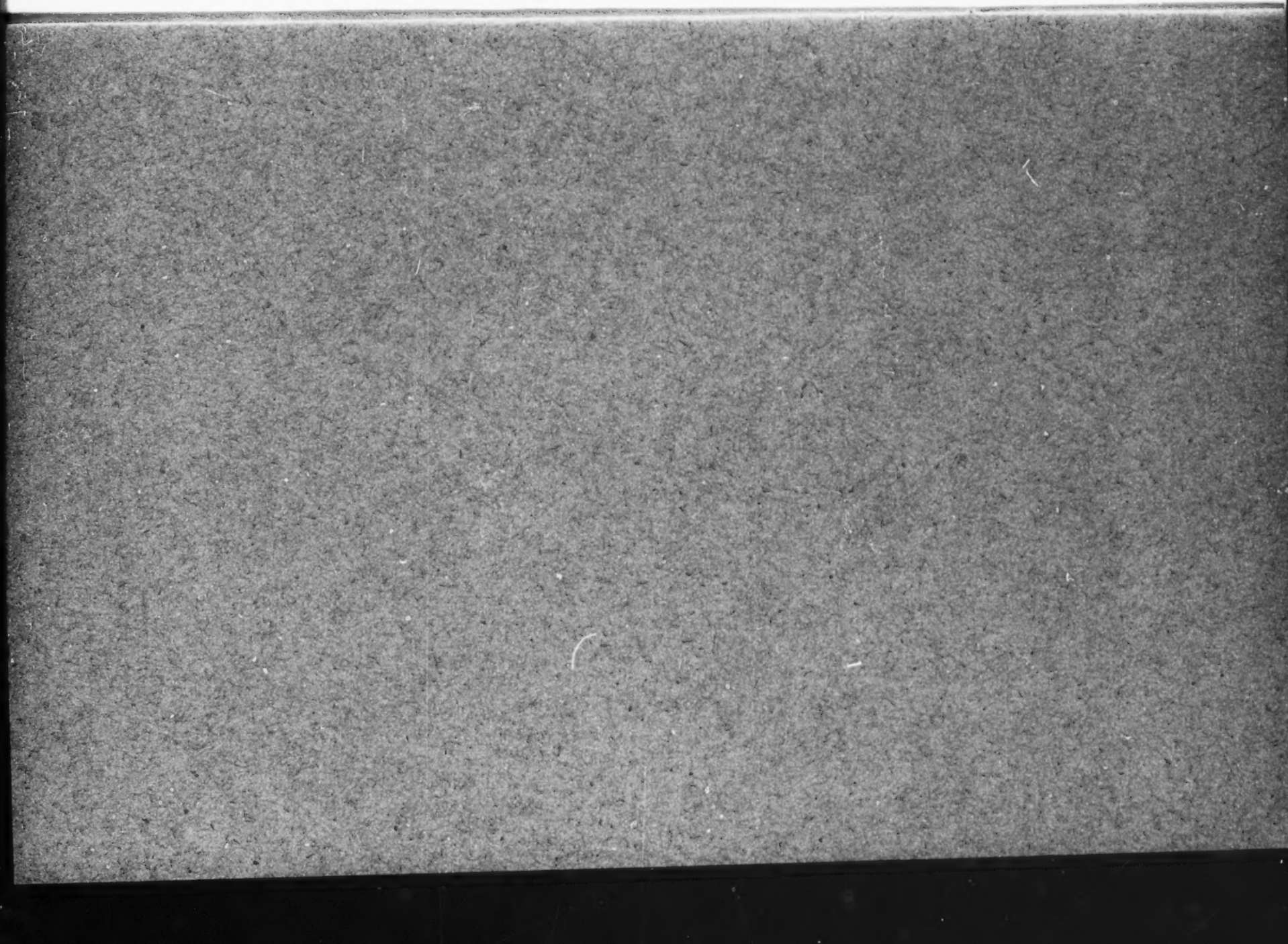

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INTRODUCTION

This brief if filed for two purposes: First of all, as a reply brief, pursuant to Supreme Court Rule 15.6, to reply to Respondent's brief in opposition; secondly, as a supplemental brief, pursuant to Supreme Court Rule 15.8, to bring to the Court' s attention the fact that the decision in the above-entitled matter is now in conflict with a decision of another United States Court of Appeals on the same important matter, within the meaning of Supreme Court Rule 10(a). To the extent that any arguments advanced in the brief in opposition are not specifically addressed in this reply and supplemental brief, such omission should not be considered in agreement with or concession of the validity of said arguments, but rather as only reflecting Petitioners' position that the argument is dealt with adequately in the original petition.

ARGUMENT

I. CERTIORARI SHOULD BE GRANTED BECAUSE OF THE FAILURE OF THE COURT OF APPEALS TO EMPLOY THE BURDEN-SHIFTING STANDARD ADOPTED BY THE PLURALITY OPINION IN *CITY OF LOS ANGELES V. ALAMEDA BOOKS.*

A. THE REFUSAL OF THE EIGHTH CIRCUIT TO ADOPT THE BURDEN-SHIFTING PROCEDURE OF *ALAMEDA BOOKS* PLACES IT IN DIRECT CONFLICT WITH THE DECISION OF THE ELEVENTH CIRCUIT ON THE IDENTICAL ISSUE.

Since the submission of the petition for writ of certiorari, the United States Court of Appeals for the Eleventh Circuit has decided a case involving the identical issue, and reached a conclusion directly contrary to the Eighth Circuit. In *Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County, Fl.*, ___F. 3d ___, 2003 W.L. 21649675 (11th Cir. July 15, 2003), the court reversed a grant of summary judgment to the County of Manatee, in a constitutional

challenge to both the county's adult entertainment zoning/regulation ordinance, and the county's public nudity ordinance, holding that under *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 122 S. Ct. 1728, 152 L. Ed. 2d 670 (2002), summary judgment was inappropriate.

The Eleventh Circuit discusses *Alameda Books* as follows:

> "The significance of *Alameda Books* is that it clarifies how the court is to interpret the third step of the *Renton* analysis as well as the second prong of the *O'Brien* test, which are, to a certain extent, virtually indistinguishable. In deciding whether a given ordinance 'is designed to serve' (*Renton*) or 'furthers' (*O'Brien*) the government's alleged interest in combating the negative secondary effects associated with adult entertainment, the standard we apply is the one described in *Renton* and utilized in *Barnes*, *Pap's*, *A.M.*, and *Alameda Books*. According to this standard, the government need not conduct local studies or produce evidence independent of that already generated by other municipalities to demonstrate the efficacy of its chosen remedy, 'so long as whatever evidence [it] relies upon is reasonably believed to be relevant to the problem that [it] addresses. [Citations omitted.] However, the government's evidence 'must fairly support [its] rationale.' [Citations omitted.] Further, Plaintiffs' challenging the ordinance after passage must be given opportunity to 'cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale, or by furnishing evidence that disputes the municipality's factual findings.' [Citation and footnote omitted.]." 2003 W.L. 21649675 at *10.

In reversing the grant of summary judgment on the public

nudity ordinance, the court noted that the ordinance , like the ordinance in the instant case"prohibits public nudity across the board and not just nudity occurring in adult entertainment establishments," and that the county expressly relied upon its determination that public nudity "increases incidents of prostitution, sexual assaults and batteries, [and] other criminal activity." In so doing, the county relied upon a report if the Florida Family Association, which included many of the studies relied upon by the county in the instant case. The Eleventh Circuit held that the county's findings and evidence were sufficient to "satisfy the pre-enactment burden as set forth in *Renton* and reaffirmed in *Pap's, A.M.*" [Citation omitted.] Id. at *13.

However, the Plaintiffs in that case directly contradicted this conclusion with satisfactory health and safety inspection reports of the Plaintiffs' businesses; incident reports of criminal activity showing lower crime rate near Plaintiffs' businesses than surrounding businesses; sales and assessment data revealing an increase in property values for property near the business; an award given to the Peek-A-Boo Lounge by the county sheriff for "outstanding contribution of the community"; and three expert studies specifically addressing local conditions in Manatee County showing no evidence connecting adult business with negative secondary effects. Id. at *13-14.

In reviewing this record, the court stated:

> "Taken together, the Adult Lounges argue that this evidence 'casts direct doubt' on the County's alleged rationale in enacting ordinance 99-18 'by demonstrating that [the county's] evidence does not support its rationale' and 'by furnishing evidence that disputes the [county]'s factual findings.' [Citation omitted.] Given the record and procedural posture of this case, we are inclined to agree. Although Manatee County met its minimal initial burden under *Renton* to rely on evidence it reasonably believed to be relevant to addressing the

> problem of secondary effects, in this case Appellants have successfully cast doubt on the county's rationale by placing into the record substantial and unanswered factual challenges to the County's findings in the specific areas of crime, decreased property values, aesthetic blight and other secondary effects." Id. at *14.

Clearly, the Eleventh Circuit in *Peek-A-Boo Lounge* reaches absolutely the opposite conclusion of the Eighth Circuit in the instant case, when, confronted with essentially indistinguishable evidence as to the absence of secondary effects on both a local and national scale, invoked the burden-shifting procedure of *Alameda Books*, and found summary judgment for the county to be inappropriate.[1]

B. THE OTHER ARGUMENTS ADVANCED BY RESPONDENT FOR REJECTING THE WRIT ARE MERITLESS.

The most obvious fact about Respondent's other arguments

1The *Peek-A-Boo Lounge* decision also reflectively refutes the distinction by Respondent in n.7 of its brief in opposition, when it attempts to distinguish *Flanigan's Enterprises v. Fulton County, Ga.*, 242 F. 3d 976 (11th Cir. 2001), cert. denied, 536 U.S. 904 (2002). Respondent attempted to distinguish *Flanigan's Enterprises* by the court's dicta that the county could enact a ban on all public nudity since this Court "has upheld that." Id. at 987. From this dicta, Respondent concludes that the Eleventh Circuit "would have decided the issue differently if the ordinance was a public nudity ordinance." *Peek-A-Boo Lounge* did in fact involve a public nudity ordinance. Nonetheless, the court held summary judgment for the county to be inappropriate and invoked the burden-shifting process of *Alameda Books*.

as they relate to the failure of the Eighth Circuit to invoke the *Alameda Books* burden-shifting procedure is the fact that Respondent is clearly defending a decision which the Eighth Circuit never made. As noted in the original petition, the Eighth Circuit held that Petitioners' factual challenge to the basis for enacting the ordinance in question was insufficient to case doubt on the county's rationale for enacting the ordinance for two reasons: First of all, the Eighth Circuit asserted that Petitioners' evidence, as it related to a decline in property values and an increase in crime in the surrounding neighborhood, related to zoning, rather than public nudity,[2] and secondly, that public nudity was held to "foster illegal activity, such as drug use, prostitution, tax evasion and fraud." *SOB, Inc. v. County of Benton*, 317 F. 3d at 863, Appendix at A. 14-15.

Respondent makes no attempt to defend that decision. Respondent does not dispute Petitioners' uncontradicted evidence that over an 8-year period at two adult entertainment establishments there has never been an arrest for drugs or prostitution. Respondent does not suggest how these secondary effects can be reduced to less than zero. Equally significantly, Respondent does not suggest any reason why this Court should engage in another "titanic surrender to the implausible,"[3] by suggesting that the wearing of pasties and G-strings will somehow make more honest taxpayers out of anyone.

Rather, Respondent challenges the factual showings made by Petitioners on grounds neither relied upon by the Eighth Circuit and expressly rejected by the District Court.[4]

2As already noted above, this proposition was clearly rejected by the Eleventh Circuit in *Peek-A-Boo Lounge*, supra.

3See *City of Erie v. Pap's A.M.*, 120 S. Ct. at 1409, Stevens, J. dissenting.

4See District Court findings of fact 9 and 10, specifically finding, based upon the entire record, that the presence of live

Rather, Respondent asserts that in *City of Erie v. Pap's A.M.*, supra, this Court, in its plurality opinion, asserted that the study done by Paul, Linz & Shafer, pointing out the inherent unreliability of virtually all studies relied upon by municipalities in this regard, was deemed insufficient to cast doubt on the municipality's finding of adverse secondary effects in that case. See 529 U.S. at 298. However, it is absolutely clear that Justice O'Connor made her remarks in *Pap's*, in the context of an adult entertainment Plaintiff which, at not stage of the proceedings, contested the city's findings that adult entertainment causes adverse secondary effects. See 120 S. Ct. at 1396.

By contrast, in *Alameda Books*, Justice O'Connor specifically permitted an adult entertainment Plaintiff to "cast direct doubt" on the municipality's rationale "by demonstrating that the municipality's evidence does not support its rationale..." 535 U.S. at 438-439.

Plainly, the submission of uncontradicted evidence[5] is certainly sufficient under *Alameda Books* to invoke burden-shifting, especially un-supplemented by the other evidence in the record.[6]

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nude entertainment has not caused secondary effects and that the county's motivation in adopting the ordinance "was to disrupt or eliminate businesses in Benton County that offer live, nude entertainment." Appendix at A.33.

5Conspicuous by its absence from this record is any evidence or argument by Respondent refuting the Paul, Linz & Shafer conclusion that the methodologies used by the studies relied upon by the county were too unsound and unreliable to permit the drawing of any conclusion related to adverse secondary effects.

6In addition to the evidence which Respondent does discuss, Respondent does not dispute that Petitioners submitted

Nor does Respondent seriously dispute the crime evidence, although it attempts selectively to manipulate that evidence to reach a contrary conclusion. The raw data were that Rumor's Bar, with no adult entertainment, had 9 police calls within a year; King's Inn, with approximately double the size and seating capacity of Rumor's had 12 such calls; Sugar Daddy's (another adult entertainment facility), 28, and the Conoco station had 32. Appendix at A.80. Obviously, one could look in isolation and determine that Sugar Daddy's had more police calls than Rumor's Bar. However, it is clear from looking at the raw data that there is no correlation between the type of entertainment offered and the number of police calls. The convenience store had more calls than either of the adult entertainment facilities. The convenience store had 3 controlled substance investigations, compared to none for the adult entertainment facilities. Id. This clearly does not support and conclusion that there is anything particularly criminogenic about adult entertainment facilities.[7]

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evidence of studies conducted under methodologically sound criteria in Fulton County, Gorgia., Charlotte/Mecklenberg County, North Carolina; and Fort Wayne, Indiana, all of which concluded there was no evidence that adult entertainment facilities caused any adverse secondary effects. Respondent advances no arguments as to why these studies do not cast direct doubt on the county's rationale, "by furnishing evidence that disputes the municipality's factual finding," within the meaning of *Alameda Books*.

7Obviously, the most profound statement ever made concerning the relationship between land use and crime was the answer famous answer given by Willie Sutton as to why he robbed banks: "because that's where the money is." Obviously, any commercial use, "where money is," will generate more crime than vacant land or residential uses, where money isn't. The issue is not whether adult entertainment will generate more crime than vacant land or

II. THE CUSTODIAL ARREST ISSUE IS AN IMPORTANT AND SIGNIFICANT ONE, UPON WHICH THE COURT SHOULD RULE.

Three important points should be made concerning the custodial arrest issue:

The first is that, even an examination of the authority relied upon by Respondent plainly reveals that, while there is as of yet, no conflict between United States Courts of Appeals and State Supreme Courts over the issue, lower courts are clearly divided and resolution by this Court is necessary. In particular, the court in *Alexis, Inc. v. Pinellas County, Fla.*, 194 F. Supp. 2d 1336, 1345 (M.D. Fla. 2002) noted:

> "[S]everal courts addressing similar circumstances have denounced the full custodial arrests of exotic dancers for violating public indecency or obscenity ordinance as violative of First Amendment principals. See *Attwood v. Purcell*, 402 F. Supp. 231 (D. Ariz. 1975); *SOB, Inc. v. County of Benton*, 171 F. Supp. 2d 978 (D. Minn. 2001);[8] *Admiral Theater v. City of Chicago*, 832 F. Supp. 1195 (N.D. Ill. 1993); *People v. Adais*, 114 Misc. 2d 773, 452 N.Y. S. 2d 543 (N.Y. Crim. Ct. 1982).

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residential uses; of course it will. The issue is whether the content of entertainment shown generates more crime than any other commercial use. The evidence in this record clearly indicates the answer to be negative.

8Obviously, this was the District Court decision in the above-entitled matter.

> [Footnote omitted.][9] While the Supreme Court has yet to squarely address the issue, as discussed below, it has recognized a significant interplay between the First, Fourth and Fifth Amendments in these matters. [Citations omitted, emphasis supplied]"

Obviously, the conflicting opinions in lower courts is precisely why resolution by this Court is necessary.

Secondly, Respondent asserts that "[s]imply because two juries have determined reasonable doubt existed as to whether the dancers violated the Ordinance does not indicate the officer lacked enough objective information to issue a citation for a violation of the ordinance." Respondent's brief at p. 19. However, the issue is not whether the arresting officer did or did not have probable cause to make that custodial arrest, but rather whether an arresting officer, unguided by a neutral and detached magistrate, should be the one making that decision in the first instance. As noted in the original petition, under this Court's decisions in *Lee Art Theater, Inc. v. Virginia,* 392 U.S. 636 (1968), and *Roadan v. Kentucky,* 413 U.S. 496 (1973), where a seizure of communicative material acts as a prior restraint on presumptively protected speech, as does a custodial arrest of a live performer, the decision to restrain speech must be made by a neutral and detached magistrate, not a police officer. The fact that juries have reached clearly contrary decisions to that of an officer clearly belies the Eighth Circuit's assertion that an arresting officer will "know to a virtual certainty" whether a live performance falls within the theatrical exception to the ordinance. The record is exactly to the contrary; the decisions should be made by neutral and detached magistrates, not police officers.

Finally, it should be noted, that, unlike all of the other cases relied upon by Respondent, the custodial arrest which would occur in

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9The omitted footnote cites two cases, relied upon by Respondent, reaching contrary conclusions.

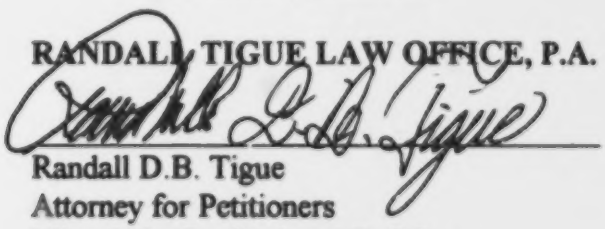
the instant case would occur not for the purpose of initiating criminal proceedings and assuring a Defendant's appearance at trial, but rather for the expressed purpose of restraining presumptively protected speech. As noted in the original petition, under Minn. R. Crim. P. 6.01, Sub. 1(1)(a), officers are mandated to proceed by citation rather than custodial arrest for misdemeanors "unless it reasonably appears to the officer that arrest or detention is necessary to prevent bodily harm to the accused or another or further criminal conduct, or there is a substantial likelihood will fail to respond to a citation." As noted in the original petition, since nude dancing is virtually never likely to cause any bodily harm to the accused or another, and anyone with identification will likely respond to a citation, the only basis for a custodial arrest would be to "prevent...further criminal conduct," meaning to prevent further dance performances. Thus the very purpose of the custodial arrest is to restrain activity presumptively entitled to First Amendment protection. This is precisely what this Court's condemnation of prior restraint is intended to prevent.

CONCLUSION

For all of the foregoing reasons, as well as those set forth in the original petition, the petition for writ of certiorari should be, in all respects, granted.

Respectfully submitted,

RANDALL TIGUE LAW OFFICE, P.A.



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Dated: July 23, 2003

Sup

SEP 2 2003

OFFICE OF THE CLERK

No. 02-1764

IN THE

Supreme Court of the United States

SOB, INC., A MINNESOTA CORPORATION, d/b/a SUGAR DADDY'S; AMY CHENOWETH; SHANNON WIBORG; KATHRYN HASKINS; MARK VAN GELDER; and MARY CLIFFORD VAN GELDER,

Petitioners,

v.

COUNTY OF BENTON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL BRIEF FOR RESPONDENT

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INTRODUCTION

The Respondent County of Benton (hereinafter "County") submits this Supplemental Brief pursuant to Rule 15.8 of the Supreme Court Rules to address a new decision which was issued by the Eleventh Circuit Court of Appeals after the County submitted its Brief in Opposition to Petitioners' Petition for Writ of Certiorari.

ARGUMENT

THE EIGHTH CIRCUIT'S DECISION UPHOLDING THE VALIDITY OF THE COUNTY'S PUBLIC NUDITY ORDINANCE IS NOT IN CONFLICT WITH THE ELEVENTH CIRCUIT'S DECISION IN THE *PEEK-A-BOO LOUNGE* CASE.

Petitioners have asserted that the case of *Peek-A-Boo Lounge of Bradenton v. Manatee County, Fl.*, 337 F.3d 1251 (11th Cir. July 15, 2003) creates a conflict between the Eighth Circuit Court of Appeals and the Eleventh Circuit Court of Appeals in regard to how much evidence is sufficient to cast doubt on a municipality's rationale for a public nudity ordinance. Petitioners argue the Supreme Court must resolve the conflict.

Contrary to Petitioners' arguments, however, the *Peek-A-Boo Lounge* case does not create a conflict between the Eighth and Eleventh Circuits. Rather, the Eleventh Circuit reached a different result than the Eighth Circuit based on the evidence introduced in the *Peek-A-Boo Lounge* case. Both courts applied the same standard and simply reached different results based on the evidence in each case. Such a situation does not create a conflict between the circuits.

In the *Peek-A-Boo Lounge* case, the Eleventh Circuit concluded that the adult entertainment businesses had cast direct doubt on the county's rationale for the public nudity ordinance. In this case, the Eighth Circuit concluded that Petitioners failed to cast sufficient doubt on the County's rationale for the Ordinance. *See* Pet. at A17 ("Sugar Daddy's failed to cast sufficient doubt on the County's rationale for the Ordinance").[1] Petitioners have asserted that the Eleventh Circuit in the *Peek-A-Boo Lounge* case "reaches absolutely the opposite conclusion of the Eighth Circuit in the instant case, when, confronted with essentially indistinguishable evidence as to the absence of secondary effects." Reply Br. at 4.[2] Contrary to Petitioners' assertion, however, the evidence introduced by the adult entertainment businesses in the *Peek-A-Boo Lounge* case is easily distinguishable from the evidence introduced in this case.

In the *Peek-A-Boo Lounge* case, the adult entertainment businesses introduced two *volumes* of evidence disputing the county's evidence which included (1) satisfactory health and safety inspection reports of the businesses by the state department of health and the fire department, (2) incident reports of criminal activity near the adult entertainment businesses and elsewhere showing lower crime rates near the adult entertainment businesses than in surrounding areas, (3) recent sales and assessment data revealing an increase in property values for property located near the adult entertainment businesses, and (4) an award to the adult entertainment business by the sheriff for its "outstanding

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1. Citations to "Pet." are to Petitioners' Petition for Writ of Certiorari.

2. Citations to "Reply Br." are to Petitioners' Reply Brief in Support of the Petition.

contribution to the community." 337 F.3d at 1270. Most importantly, however, the adult entertainment businesses also introduced three expert studies that specifically addressed local conditions in the county which purported to show that there was no evidence connecting their businesses with negative secondary effects. *Id.* at 1270-71.

In comparison to the *Peek-A-Boo Lounge* case, the evidence submitted by Petitioners in this case is limited to the self-serving Affidavit of the owner of the adult entertainment business, Mark Van Gelder, some property information submitted by Mr. Van Gelder, and two papers written by Paul, Linz and Shafer. Contrary to the *Peek-A-Boo Lounge* case, Petitioners in this case did not introduce satisfactory health and safety inspection reports of the adult entertainment businesses or any awards to the businesses for "outstanding contribution to the community." Most importantly, there are no local studies in this case which address the negative secondary effects associated with the adult entertainment business or the lack thereof.

In the *Peek-A-Boo Lounge* case, besides introducing recent sales and assessment data revealing an increase in property values for property located near the adult entertainment businesses, the businesses also introduced an extensive "Market Study and Report" by a licensed real estate agent. 337 F.3d at 1271. The study analyzed the effects of the adult entertainment businesses on neighboring properties. *Id.* The study concluded that there were "no signs of any negative effects on adjoining property values or conditions" resulting from the businesses. *Id.*

In comparison, in the present case, Petitioners introduced a property analysis that Mr. Van Gelder had prepared.

As thoroughly discussed in the County's Brief in Opposition, the County submitted an Affidavit from the County Assessor explaining why Mr. Van Gelder's analysis was misleading and did not establish anything regarding the effect a certain type of business may have on nearby property values. *See* Br. Opp'n at 9-12. Unlike the information submitted in the *Peek-A-Boo Lounge* case, many of the entries in Mr. Van Gelder's submissions did not reflect any recent sales and the sales that were reflected showed an incorrect percentage increase in value. *See* Br. Opp'n at 10-11.

In the *Peek-A-Boo Lounge* case, besides introducing incident reports of criminal activity showing lower crime rates near the adult entertainment businesses than in surrounding areas, the businesses also introduced an expert study by Dr. Terry A. Danner, Chair of the Department of Criminology at St. Leo University. *Id.* Dr. Danner conducted a study using the county's own crime statistics and concluded that the adult entertainment businesses did not cause an increase in crime. *Id.*

Unlike the *Peek-A-Boo Lounge* case, Petitioners in this case did not introduce incident reports of criminal activity near the adult entertainment businesses and elsewhere showing lower crime rates near the businesses than in surrounding areas. Rather, Petitioners simply introduced Mr. Van Gelder's self-serving Affidavit. Petitioners did not conduct a local study to determine the effect adult entertainment businesses have had on local crime rates in the County. Rather, Petitioners selectively chose two local businesses and compared the police calls to those businesses with the police calls to the two adult entertainment businesses. Mr. Van Gelder's Affidavit does not explain where the two local businesses he selected for comparison

purposes are located in relation to the adult entertainment businesses. Mr. Van Gelder's Affidavit does not establish that there are lower crime rates near the adult entertainment businesses than in surrounding areas. *See* Pet. App. at A80-A81. As thoroughly discussed in the County's Brief in Opposition, Mr. Van Gelder's Affidavit does not cast legitimate doubt on the County's conclusion that adult entertainment businesses cause adverse secondary effects. *See* Br. Opp'n at 8-9.

Finally, the only other evidence submitted by Petitioners is two articles written by Paul, Linz and Shafer. Petitioners claim that these articles cast doubt on the validity of the studies relied upon by the County in enacting the Ordinance. As explained in the County's Brief in Opposition, the Paul, Linz and Shafer papers are clearly insufficient to cast legitimate doubt on the County's rationale for the Ordinance. In *City of Erie v. Pap's A.M.*, 529 U.S. 277, 298 (2000), this Court specifically stated it did not view the Paul, Linz and Shafer article as sufficient to cast doubt on the city's rationale for the ordinance. *See* Br. Opp'n at 7.[3]

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3. In addition, when courts have addressed the problem of conflicting proof, they have unequivocally stated that the power to weigh the credibility of evidence lies with the municipality and not the courts. It is the role of the County Board to determine which evidence to rely upon and how much evidence is enough to require action in redressing a perceived problem. *See generally Threesome Entertainment v. Strittmather*, 4 F.Supp.2d 710, 719 (N.D. Ohio 1998) (explaining that city's choice of whether it should rely upon one report over another was fully within city's legislative discretion and that court need only conclude that reasonable legislature would have enacted challenged ordinance); *SDJ v. City of Houston*, 636 F. Supp. 1359, 1367 (S.D. Tex. 1986), *aff'd* 837 F.2d 1268 (5th Cir. 1988) (explaining that fact that other experts hold conflicting opinions on

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A comparison of this case to the *Peek-A-Boo Lounge* case clearly shows that the evidence introduced in the two cases is substantially different. Whereas in the *Peek-A-Boo Lounge* case, the Eleventh Circuit determined that the adult entertainment businesses had successfully cast doubt on the county's rationale for the public nudity ordinance by placing into the record substantial and unanswered factual challenges to the county's findings, in this case, the Eighth Circuit correctly found that Petitioners had not produced evidence to cast sufficient doubt on Benton County's rationale for the public nudity ordinance. The *Peek-A-Boo Lounge* case does not demonstrate a split in the circuits. Rather, the *Peek-A-Boo Lounge* case simply shows how each case regarding a public nudity ordinance must be analyzed on its own facts and evidence. Decisions that reach different results based on different evidence do not create a conflict in the circuit courts. This Court should deny the petition.

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effects of sexually oriented businesses on property values is irrelevant to court's First Amendment inquiry); *N.W. Enterprises v. City of Houston*, 27 F.Supp.2d 754, 801 (S.D. Tex. 1999) (explaining that "[i]t is not this Court's role to weigh competing evidence on factual issues").

CONCLUSION

For the foregoing reasons, as well as those set forth in the County's Brief in Opposition, the petition should be denied.

Respectfully submitted,

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